United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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AFTERNOON SESSION

2.00 P.M.

EDWARD DUKE VINCENT, resumed.

CROSS EXAMINATION CONTINUED

BY MR. TOPKIS:

Q Mr. Vincent, you testified this morning, I think, that one of the reasons why you would like the per use world would be that that would be included an additional sum in your budget if you were a musical show producer, for music performing rights and that would increase your flexibility.

Do you remember that testimony?

A Yes, I do.

Q I take it from that that you like being able to move around in the exercise of your creative skill, wisdom, judgment, whatever?

A I am not sure I know what you mean by move money around. Do you mean do I like to be able totrade off one element against another one in the show?

Q Right.

A And control the budget, completely?

Q Yes.

A Yes, I do like that.

Q And that is because it gives you the maximum freedom to create, right?

A Theoretically, yes.

Q You say theoretically, yes.

Practically,no?

A No, because there are circumstances where we would have a forced situation, where the amount of money you had to deal with wouldn't allow you that kind of flexibility. It wouldn't happen often but, generally speaking, if you have all of your moneys for a particular show in front and you are creating that show and directing along creative lines, then the greater the flexibility you have as a producer, the better off you are.

Q Right, because then you can use whatever material you want within the total limits of your budget.

A Whatever the elements of that material are, right.

Q On your show, the Nabors show, you used an awful lot of standard music, didn t you? I mean Cole Porter, Richard Rogers, Irving Berlin and so forth.

A We used a lot of standard music, yes.

Q And you also used a lot of show tunes?

A Yes.

Q Do you happen to remember a show that ran on May 20, 1971, of which I have only the CBS clearance sheet, but let me see if, by telling you what the music appears to

have been, can refresh your recollection about it.

According to this sheet, it ended with a big finale number based on the music from Man of La Mancha with I, Don Quixote, Dulcinea and, of course, The Impossible Dream.

Does that start your memory juices?

A Yes, vaguely.

Q And, again, according to this cue sheet, the show began or had as its first big production number what appears to have been a Cole Porter - Richard Rogers -- well, it's "Another Opening, Another Show," "From This Moment On," "Just One Of Those Things," "The Trolley Song," "Oklahoma," "Everything Is Coming Up Roses," and "There Isn't No Business Like Show Business."

A That was the opening number?

Q No. That seems to have been the first big production number. The opening number --

A That was probably a medley sung by two stars.

Q It says Jim Nabors and Karen Morrow.

MR. HRUSKA: Could I ask that the witness be shown this cue sheet so that he could follow this? He has made a statement that there was a medley or a production number which opened the show, which turned out not to be the case.

THE COURT: Let's see what the questions are, whether he needs to see the cue sheet. I have no objection to it, but I don't know what the purpose would be at this point.

MR. TOPKIS: There is no secret about it. I have no need for it. Here is a copy of it.

If you want one, God forbid we should exclude you, Mr. Vincent.

THE WITNESS: Thank you.

MR. TOPKIS: If your Honor wants one, too, but I think it's a waste of time.

Q Wouldn't you say that that cue sheet or that show was a fairly typical show?

A I really can't answer that question after three years now. I know that most of the shows that we did took a specific form and I described that form. Whether this particular show fits into that overall form, after three years, I can't answer that question.

It would seem that if we are using these songs, yes, it would be from the point of view that there are Broadway show tunes in here and that there are -- that there was an opening number and a finale and a medley

From that point of view, it's a typical show.

MR. TOPKIS: All right. I will ask that it be

marked, your Honor, and offer it in evidence.

(Defendants' Exhibit AX 183 marked for identification.)

THE COURT: You offer it in evidence?

MR. TOPKIS: Yes.

THE COURT: Any objections, Mr. Hruska?

MR. HRUSKA: No objection, your Honor, other than the objection I have to ASCAP offering documents in evidence during our part of the case.

If I may have a standing objection to that procedure, then I won't have to say anything additional.

THE COURT: You will have a standing overruling, also.

MR. HRUSKA: I understand that.

MR.TOPKIS: Could I inquire of counsel whether he has ever had that objection sustained? Never mind.

THE COURT: Later on, on your own time.

Miss Kearse, you have a right to object. Do you?

MISS KEARSE: No objection.

(Defendants' Exhibit AX 183 received in evidence.)

Q You used on that show the music of Cole Porter and Richard Rogers and Oscar Hammerstein and Julie Stein

and Steven Sondheim and Richard de Coven, and Mitch Lee and Joe Darian from Man of La Manchu.

Don't you like the world, Mr. Vincent, where you can use that music freely in the exercise of your creative impulses without worrying how much you have to pay for it?

A No, sir. I am paying for it, in fact, by the fact that I am not receiving the money in front, so, whatever money I do not receive from NBC, and they have to pay for a blanket license, I am in effect paying for it anyway, am I not?

Q Well, I think we better get squared away for the moment.

This case involves CBS.

A I'm sorry. CBS. I happen to be on NBC at the moment.

Q You are with NBC right now?

A That's right.

Q So, your testimony is that you would rather have the flexibility of having some more money in your budget than the right to have free access to Cole Porter, Richard Rogers, Irving Berlin, Steven Sondheim, Julie Stein and anybody else you wanted whose music was cleared through ASCAP?

A Mr. Topkis, I think your question implies that

if I had the money in front under a per use system, I would not have access to the writers. My understanding that I still would have access to the writers.

Q Did you ever talk to Irving Berlin?

A Not once, ever.

Q The late Cole Porter, before his untimely, unfortunate death?

A No, sir.

Q Julie Stein?

A Yes. I have spoken to Julie Stein.

Q Not about music licensing, though?

A No.

Q As a matter of fact, did you ever talk to any songwriter about music licensing?

A In terms of the per use license or in terms of what is now in existence?

Q Either way.

A Yes, sir, I have. We have had discussions among writers about the way they received their moneys, because I asked. I was interested. I did not know.

Q Recently?

A Within the last year.

Q Until then you had never had any discussions with songwriters on the subject?

A Yes, as far back as 1964.

Q With whom, as far back as 1964?

A Cy Coleman.

Q Cy Coleman?

A Yes.

THE COURT: Cy who?

MR. TOPKIS: Coleman. C-o-l-e-m-a-n, your Honor.

THE WITNESS: He is a composer with whom I was working at the time.

Q Your understanding of the per use world is one in which you would be free to use the music of Berlin, Porter and others I mentioned; you would just have to negotiate the price, is that right?

A Well, not exactly, no.

If they have pulled out of the reservoir, my understanding is that I am able to contact them, there would be someone with whom I could speak and I would be able to negotiate a price.

Probably, I would assume, again, the reason they have pulled, and not set a fee, is because they think their song is probably worth more money. That would be the only logical business reason that I can think of.

At that point, it would become negotiation,

but if the machinery were set up with which to deal, that music would be, again, theoretically, available to me, if it were not in the pool.

Q Assuming that you were willing to pay the price they asked?

A Absolutely.

Q But suppose Mr. Berlin wanted a price higher than you were willing to pay. You couldn't use his music, then.

A You are saying that I could not negotiate for a price that was reasonable and amenable to all parties?

Q No. I didn't say anything like that.

I said that Mr.Berlin might conceivably, for whatever wild impulses he might experience, decide to ask the price higher than you were willing to pay.

A Well, two situations could exist:

One is that I did not have the money in my budget and which, as I already stated, if I really needed that song and could not replace it with anything else, I would attempt to go back to CTN and ask for relief. I would ask for more money.

But if you are postulating or posing a question whereby I want something from Annie Oakley and Irving Berlin wants $100,000, no, I can't deal under those circumstances. I wouldn't use that song, probably.

Q Suppose you had the same experience not only with Irving Berlin but with Cole Porter and Steven Sondheim and Mitch Lee and Joe Darian.

What would you have done for the show of yours of May 20, 1971?

A Again, Mr. Topkis, I have to ask exactly what you mean. If you are saying I am a buyer and they are sellers and they have a reason not to deal with me and do not want to, I am in an untenable position. I don't like that position.

I want to be able to negotiate in a free and open market between a buyer and a seller.

If you are telling me they are not going to make their music available to me, obviously, I don't like that at all.

Q Let's back off for a second.

This enthusiam of yours for a free and open market where you deal between buyer and seller, you couldn't care less about a free and open market, could you? You are concerned with the exercise of your creative impulses.

A No, Mr. Topkis. I am also in business. There is another reason why I like a free and open market.

I like to be able to negotiate for a fee that I think is right for my show for a particular use.

Now, if there an arbitrary figure put out, then I have no choice but to deal with that figure, and that's one situation.

If you are asking me what I would rather do, I would rather have a sum of money with which I can do anything that I think creatively that show needs and I would like to be able to deal with all elements of that show, including music performance rights on a negotiable basis.

All I am asking the right for is to negotiate the price for an element of the show which I am purchasing, as a buyer. I assume that there are sellers here and I want to talk to them about what that price should be.

Q What do you mean by a free and open market? You mean many buyers and many sellers?

A Well, the buyers, obviously, are those people who are packaging or producing television shows. The sellers are those people that have copyrights to songs.

By a free and open market, I mean I honestly believe, and again I am giving you my opinion based upon every other element that I negotiate for, I think that music will find a level in that market.

I think that if Mr. Berlin wants $100,000 for Annie Oakley, he may want it for today, for tomorrow or for next week, perhaps, but obviously I can't afford to pay

that.

Q Suppose he wants --

A That is unreasonable.

Q Please go on.

A I said, to me, that is unreasonable. If you are saying that the price is higher than I would have expected to pay, then we are again involved in a negotiation between buyer and seller.

I think that the market would find its level under those circumstances.

2a Q At least that's your hope?

A My hope.

Q How would you feel if Mr.Berlin asked $1500 for a performance, rather than $100,000?

A Under what circumstances, sir?

Q Per use system.

A No, but I mean -- again, I believe that there are various uses for a particular song. I don't know what kind of a use you are talking about.

If I want to use four bars of that song, I think perhaps, I might think $1500 might be a little bit too high and I may try to negotiate for a lower price, but he certainly has the right to ask $1500.

Q Okay. Suppose Mr. Berlin and Mr Sondheim and Lee and the others we have been talkingabout on this exhibit all asked somewhere between $1500 and $2000 per composition per performance on the Jim Nabors Show, and make it feature performances, so we don't get into the four bars bag -- what would you do then?

A At that point in time, I would have assumed, or I will assume now, that that is the level that the market would have reached and whatever that figure is, it would be a figure that I would negotiate with CTN, so that if that is

what music rights were going for, based upon whatever, court decision or negotiation between the parties, that's not my area.

All I ask, Mr. Topkis, is I have to buy an element of a budget. I need the money to buy that element with in order to produce my show. Whatever number that is, whether it's $1500 a song or five or $5000, that is not of my personal measure of concern.

All I need is a number of dollars with which to deal with that level, once it's established.

Again, in the beginning, I can see there might be a problem. People have to be flexible -- mainly CTN -- but that's not my problem. My problem is laying out that show and producing it.

Q With CTN backing you with whatever money you needed, you had nothing to worry about, is that right?

A No, that's not right. The money is one element. I also have to be able to deal in the market with a piece of machinery that will allow me the time. Time is the other element.

I am pushed constantly in two shows simultaneously. If I have all the money in the world and I cannot make a deal, what good is it to me?

Q Well, actually if you wanted to obtain direct

licenses for a show like the Jim Nabors Show today, how would you go about it and I am saying direct licenses, not per use licenses. I am talking about the direct license. I am talking about that situation that Mr. Hruska posed to you this morning where CBS abandons its blanket ASCAP and BMI licenses.

A How would I go about it?

Q Yes.

A How would I find the music, how would I locate the publishers, the copyright owners?

Q Right. What would be your first step?

A I would attempt to find out where the information was.

Q Who would be the first person you would talk to?

A In this particular case my associate producer.

Q Your associate producer?

A A Mr. Watson. I would ask him.

Q Before you tell me what you would ask him because all I asked for was the name.

A The name of the person I would contact?

Q Right. My next question to you is, how long would it take you to think of Bernie Brody?

A Minutes.

Q I figured as much. Do you think Mr. Brody would

have any difficulty in putting you in touch with any copyright proprietor?

A No, I don't think he would have any trouble, or giving me the addresses or names of those people.

Q I agree.

A However, I don't think that -- may I finish?

Q Yes.

A I don't believe that just that name and telephone number is going to do me any good because when I pick up that telephone and I dial that number, whatever music publishing company I am dealing with, or whatever copyright owner, I have no reason to expect that there is someone on the other end of the line without any machinery set-up with whom I can deal, who will understand what I want. why I want it and what I am willing to pay for it.

Q You have never tried, of course, have you?

A No, sir, I have not tried. I do know that every day I call agents.

Q Excuse me, please. Let's just try answering my questions.

A Okay. I am sorry.

Q Thank you.

Now, suppose you call those people, what leads you to believe publishers -- did you ever talk to a

publisher about music licensing?

A No, not directly.

Q What leads you to believe that you would have so much difficulty getting through to somebody at Irving Berlin's organization who would be able to talk with you about licensing?

A I answered that question this morning, Mr. Topkis. You objected to my answer.

Q Did I?

A Yes.

Q I can't recall, but I certainly regret it.

A My reasons would be the same.

Q You mean that whole bit about disinclination and they would hate you?

A Yes.

Q That I understand. But surely they would not have any trouble talking to you on the telephone, would they? If you can dial, they can listen to you and respond?

A Who?

Q Any publisher you are put in touch with by Bernie Brody.

A Initially, I will get a secretary. From the secretary I will get a person who probably has not done this either. I haven't done it and I don't know that

publishers have dealt with direct --

Q They license synch. rights all the time, don't they?

A I don't know that that is the same in this particular case. I do not know that it is the same at all.

Q And you do not know that it is different and all you are doing is guessing?

A One is performance rights and one is synch. rights, I don't know it is different.

Q I agree.

Where is your office, exactly?

A As of last year, as of now or as of next year? Because it's three different answers. As of last year, at Warner Bros.; as of now, nowhere, now that we are negotiating.

As of next year, whatever place we negotiate for.

Q That reminds me of something. Haven't all the networks locked up all their schedules for next year?

A They have.

Q If I were going to be associated with a show that's going to be on a network next year, don't you know already what show it is?

A No. All that's happened so far is that the networks have decided on their schedules and they have made their deals with independent production companies or with studios. The studios or the independent production companies have not necessarily hired the producers or the creative staffs with which they will then deliver those shows to thenetworks. The reason they are not able to do that at the moment is because we are not allowed to negotiate, those of us that are writers and producers, at a time when there is in fact a strike on in our industry, so there is a piece of limbo at the moment that we don't normall, deal with.

Q I now have some happy news for you that I had heard, from what I thought were reliable sources, that you were going to be connected with a show next year called Temperatures Rising, produced by Screen Gems.

A That is only a possibility, Mr. Topkis. There is no formal deal, as we said this morning, in existence. No contracts have been signed.

Q No contracts have been signed?

A No.

Q But that's not an inhibiting factor in your business, you told us this morning, also?

A Not at all. Certainly not. That is a possi-

bility.

To be direct in answering your question, yes, it is, but I do not know in fact that will be the case, because there are two other possibilities.

Q You told us, I think, that you began your career in television with Man In Space in 1964?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q What had you done before then?

A Prior to that time I had been writing as a free lance writer and attempting to sell whatever it was I wrote. I wrote a musical comedy, the book and lyrics of a musical comedy, in 1962 and 1963, which was produced in Chicago and never got to New York, unfortunately.

And in 1962, I had just resigned from the Navy. I was a naval aviator.

Q Are you by any chance a member of ASCAP?

A Yes, I am.

Q Now, will you tell us why you didn't take my telephone call.

Man In Space was produced, you said, by Saven Arts.

On what network did it appear?

A That was a syndicated show. It was originally designed to be on NBC, but it was done with Seven Arts and WOR, which was R-K-O General, I believe, at the time, and it was a syndicated show which was syndicated by Seven Arts.

It, however, was a documented series. I don't know if I stated that, your Honor.

It was a series of documentary programs, as opposed to a half-hour situation comedy or variety show.

THE COURT: I am not clear I understood how your answer relates to the question. I understood the question to be what network it was on. Does it mean it was on more than one network?

THE WITNESS: It was not on either --

THE COURT: It just went to stations as they chose them?

THE WITNESS: Yes. One of those stations could have been very easily affiliated with a network, but not the net as a whole.

Q They were broadcast as local programs when they were broadcast, is that correct?

A That is right.

Q You were on Man In Space from '64 to '67, is that right?

A That's approximately correct.

Q Then, you moved to California and you worked on Good Morning, Wald?

A That's right.

Q What network, if any, was that show on?

A CBS.

Q Then you worked on The Doris Day Show?

A I was a writer. I was not producing that show. I was a free lance writer on both those shows my first year. Doris Day was on CBS. Both shows on CBS.

Q Then, you went to Gomer Pyle?

A At CBS.

Q And then, you were on the Nabors Show?

A Jim Nabors Hour, CBS.

Q And then you went to Arnie?

A Arnie for Twentieth-Century Fox.

Q On what network, please?

A CBS.

Q And this past year you have been on NBC, with The Little People, produced by Warner Bros.?

A NBC.

Q You said that you were a member of ASCAP. Who was your publisher?

A Well, the only music that he ever done for ASCAP

was the music that was done for the show I just spoke of. It was published through one of Mr. Coleman's firms.

Q Cy Coleman?

A Yes. I honestly do not know the name of the firm.

Q If the musical director of a musical variety program or if somebody like Bernie Brody came to you in your capacity as songwriter andsaid, "Mr. Vincent, would you deal with me for a direct license," would you be inclined or disinclined to deal?

A In my capacity as a songwriter? I never worked as a songwriter for a network.

I only was involved in that one show in 1964, so I don't know if I can answer that.

Q You do have an interest in some compositions that are in the ASCAP repertoire, is that right?

A That's right.

Q Suppose somebody came to you and said, "Mr. Vincent, we are going to put on a musical variety show next month and we would like to use some of those songs of yours that are in the ASCAP repertory, and we would like to get a license directly from you and your publisher to do so." Understand what I am asking you to assume?

A I think I do. Under the present system now,

under what system are we living?

Q Under any system that you can imagine.

A All right. Go.

Q Would you be inclined or disinclined to deal with that person?

A Well, all right. There are two possibilities. One is --

Q Somebody once said there always are. Go ahead.

A One is that I would have no idea at this moment in time on what basis I would be dealing but I personally would be willing to make that deal, of course, because I have no -- I am not receiving any distributions at the moment for those songs, so that I am receiving zero, and you are asking me whether I accept something? Logically, yes.

Q It's nice to find a songwriter who is willing to deal.

You said before, I think, that if CBS dropped its blanket license and went on a direct licensing basis, you, as the producer of a musical variety hour, would be concerned because of the absence of machinery for obtaining direct licenses.

Do you remember that testimony?

A Yes, I do.

Q Wouldn't you be equally concerned as to the

availability of machinery for dealing with ASCAP members and BMI affiliates who withdrew their composition from per use licensing in a per use work?

A No, sir, I would not.

Q You think machinery to deal with them would spring into existence?

A Under those circumstances, as I understand it, they would have been told that that is the way they must deal with me and, therefore, I would expect that they would deal, if I am a buyer and they are a seller.

Q Let me correct your assumption, or offer you another assumption.

I don't mean to correct it. Let me ask you to assume not that they have been told that they must deal with you but that they have been told that they are free to deal with you or not deal with you, as they see fit.

Now, on that assumption, have you any particular reason to believe that machinery would spring into existence by which you could deal with them any more readily than it would spring into existence if CBS worked on a direct licensing basis?

A I am a little confused. May I ask you this:

Are you asking me if machinery exists under any circumstances, am I happy? Is that the question, basically?

Q No, that's not quite the question.

THE COURT: I understand Mr. Topkis' question to be this. I am intervening to be sure not only I understand it but because I want to ask this question if it isn't the same as yours. Namely, you have pointed to the virtue under a per use, new per use system of there being a method by which you can go to the reservoir as distinct, for example, from another hypothesis put by Mr. Hruska where if he dropped his blanket license you would have nowhere to do. I understand what Mr. Topkis asked. That may be true about the music that is in the reservoir, but how about the music that under those circumstances would be outside the reservoir, what would you do about the lack of system there?

THE WITNESS: Your Honor, there would still be a system because my understanding is if these copyright owners or publishers pulled those songs out of the reservoir, they would have had to have given me the name, address and telephone number --

THE COURT: Even under Mr. Hruska's hypothesis, they would not be compelled to do so. You may assume as a result of your experience --

THE WITNESS: I would think, your Honor, that the reason they pulled the song out was because they thought they could get a better price than they could if the song

were in the reservoir.

THE COURT: Therefore, you have deduced they would keep in touch with their customers?

THE WITNESS: Right.

Q You would think they wouldn't want to keep in touch with their customers if CBS went on direct licensing?

A No, sir, for the reasons I have previously given.

Q Those reasons are that they would be disinclined to deal with CBS?

A I would be concerned that they would be trying to -- that they are enjoying the system under which they are operating and, therefore, would be disinclined to want to deal with me as quickly or within the time frames that I need. That is my concern. I don't say it will or will not happen, sir. I am concerned about it.

Q So it is not a matter of absence of machinery in either the per use world or the direct licensing world, it is a matter of the attitude that you are concerned about on the part of the ASCAP members and BMI affiliates?

A No, sir, I did not mean to say that. I think the machinery is terribly important. I think it is one of the primary things, the machinery has to be there and I believ under those circumstances I will have an attitude with which I can deal. Under a by-pass system whereby CBS unilaterally

withdraws its blanket license and goes it alone, I have concern there.

THE COURT: All right, I understand what you are saying but just so we are all sure of our terminology: You said that the presence of the machinery is of vital importance to you. But insofar as we are talking about a proposed new per use system, you understand, do you not, that the only proposed machinery would be with regard to to the reservoir, the only proposed complete machinery would be with regard to the reservoir and that the other machinery would exist to the extent they pull out copyright owners wishes to, but not otherwise, you understand?

THE WITNESS: Wish to deal with me and that was the reason -- the reason they pulled out was because they probably thought they could make a better deal, yes, sir, I understand.

THE COURT: All right.

Q The program you have been connected with this past season, "Little People," did that make any use of Broadway show tunes?

A No, I don't believe -- no.

Q Standards?

A No.

Well, I say, "No." Don't let me say it so quickly.

There were a few songs we used. That was again, a half-hour situation comedy, your Honor. Normally, the music that is used within a show of that type is background music with scoring within scenes or the bridge scenes.

There were times, not many but a couple of times within that half-hour that we found ourselves in a night problem and it could have been background music at the time. Exactly what it was I don't recall. It could have been a standard. It could have been a Broadway show tune, but Brian Keith did not sing the Broadway show tunes in that half-hour.

Q So that nearly all of the music, with a rare exception, may be a couple of times; nearly all of the music on "Little People" was background and theme and bridge music, right?

A Yes, sir.

Q And that music was specially written for the show?

A Yes, it was.

Q By a composer who specializes in writing such material?

A Yes.

Q Who was that composer?

A Gerry Fielding.

Q Who published that music?

A I don't know.

Q The show was produced by Warner Brothers?

A Yes, it was.

Q It wouldn't surprise you to hear that it was published by Warner Brothers or an affiliate thereof?

A Not at all.

Q That would be in accordance with usual trade practice?

A Well, either by Warner Brothers or certainly by a company that was, a publishing company that either Jerry Fielding owned or perhaps they might have shared the publishing.

Q Fielding and Warner Brothers?

A Fielding and Warner Brothers. That could be a typical arrangement. I do not know what the arrangement was. I did not negotiate that package. I was given the budget when I arrived. The pilot had been shot and I was asked to creatively direct that show within those budgetary bounds at that time so that any negotiations between Jerry Fielding and Warner Brother, I am not aware of.

Q The perhaps a couple of instances when Broadway show tunes, standards, other feature music was used in a show --

A In the "Little People"?

Q Those rare instances you mentioned. Was that music part of the Warner Brothers catalog, do you happen to remember that?

A I do not know, sir. I have no idea or I have no way of knowing that. I would not have checked it at the time nor would I have been concerned with it. In other words, when I spotted the show, it would not be one of the questions I would ask as not part of that -- I would ask as part of the package. Whatever piece of music was used in the scene and there might have been four or five over the course of that year, would have hopefully been necessary to that particular scene. Whether or not it was published by Warner Brothers, I do not know.

Q And these were feature uses of music but if you had been unable to clear a particular composition, three or four alternatives would easily have occurred to you, is that right?

A Hopefully, yes.

Might I add one thing, sir?

Q Please.

A In the case of a show like the "Little People," a half-hour situation comedy, we are dealing with a post-production element, we are dealing with music, so, as Mr. Topkis suggests and it is absolutely right, the ability to

trade off or switch a song within a scene at a given moment in time, provided it is not a live performance where there is sync involved is comparatively easy when compared with a live variety show, so that what you suggest in the "Little People" is a definite possibility at that point in time.

THE COURT: A post-production proposition, I gather, means that you can add in or you do add in the music after the show has been produced, is that right?

THE WITNESS: After the show has been shot. At the time when we bring all the final elements in.

Q The two -- there are going to be two musical variety shows on CBS next year, we have been told.

A That is what is on their schedule.

Q Are those post-production shows or what?

A Well, the one show, the Carol Burnett show is not. There are post-production elements involved in that they will edit certain portions of their show.

The other one, I believe, is -- Is it Sonny & Cher? I think it might be Sonny & Cher, because I believe I believe Bill Cosby was cancelled.

Q You are right.

A That show I have only seen a couple of times, but the times that I saw it, I believe that they had animated elements in that show.

THE COURT: People synching?

THE WITNESS: The animated characters synching -- so, in other words, that would be a typical post-production element that might exist within the form of Sonny & Cher that did not exist in Nabors nor does it exist, to my knowledge at the moment, in Burnett, but primarily those are of the same general form. Sonny & Cher tapes before a live audience in Television City, and most of the elements of that show, as far as I know, and I am not that familiar with it, are done at that point in time, especially the comedy elements. You would always prefer to do comedy before a live audience so you can get their reaction.

MR. TOPKIS: We have nothing further for the moment, your Honor.

THE COURT: Very good.

Miss Kearse.

MR. TOPKIS: We would like very much, of course, to see that file, that negotiating file on the Nabors Show.

THE COURT: Mr. Hruska, I will ask you to check that.

MR. TOPKIS: I take it Mr. Vincent will be available for interrogation if needed.

THE COURT: He may be in California.

What are your practices, to get back to New York

or not?

THE WITNESS: At the moment, because my mother is ill, I have been coming back and forth. It all depends on when the Writers Guild strike ends. If the Writers Guild strike ends we will go into production as soon as possible, at which point it would be difficult, but perhaps I can be of some aid to you right now.

THE COURT: When are you planning to leave New York?

THE WITNESS: I planned to leave tomorrow.

THE COURT: In the morning?

THE WITNESS: No, it doesn't have to be. It could be later in the day.

THE COURT: Mr. Hruska, is there any way one of your associates could find out in the afternoon if there is --

MR. HRUSKA: We will try. I have never seen the file. Each one of the associates working on the case right now has another important job to do at the moment, and I will try to work out --

THE COURT: All I am asking you to do is to make a phone call to whoever that would be.

MR. HRUSKA: I have already made a phone call to get the file.

THE COURT: All right.

THE WITNESS: May I try and be of some help in that area, your Honor? I am aware of one item only. You speak of a file. I don't know what that file -- I had no knowledge of the file's existence --

THE COURT: Just a minute. That is really precisel the point. None of us does, and we have to look. They may have things that relate only to themselves and not to you.

THE WITNESS: The budget in that particular file, the initial show budget, would be the only thing that might perhaps shed some light on it, if there was one in existence, but CBS would really have no reason to have it.

THE COURT: Mr. Vincent, don't worry about it now. It's barely possible we may have to call you back.

MR. TOPKIS: Couldn't we do it more easily, your Honor? I know my office can produce anything from our files by tomorrow morning. And so can ASCAP. And if CBS can't, then I don't know what is wrong. I don't know why that file can't be here the first thing tomorrow morning along with Mr. Vincent.

MR. HRUSKA: Your Honor, we asked for a number of things from ASCAP to be here the first day of the trial. We haven't seen those documents yet.

THE COURT: I can't understand throughout this

case why I am supposed to decide something on one side because of what another side did or didn't do. Let's stick with the issue. I am only asking you if you know of any reason why CBS can't produce those papers so we can have them tomorrow morning and find out if we need the witness for more questions, and send him on his way if we don't.

MR. HRUSKA: I want to look through that file myself. I want to see if there is anything pertinent to this point and should be produced.

THE COURT: You can bring it here, whatever is in your judgment, you can bring it here tomorrow morning, can you not?

MR. HRUSKA: I want to say yes to that question, your Honor, but until I see that file -- if there are twenty thousand documents in that file, taking a ridiculcus extreme case, I would have to say no.

THE COURT: Please find out, Mr. Hruska. There are five lawyers sitting at your table. Find out so we can make some plans here. We have only a limited amount of time in which to try this case. I don't think that ASCAP's request is unreasonable. They have a right to see if there is anything relevant on which to question the witness. He comes from a distant part of the country. He will be beyond the subpoena power of the Court if he doesn't

want to come back.

If you want to use the telephone in the robing room, you can do it.

Thank you.

Miss Kearse, I think you were about to ask the witness some questions.

CROSS-EXAMINATION

BY MISS KEARSE:

Q Mr. Vincent, were you ever on the production staff of the Carol Burnett Show?

A As an observer and as a "student."

Q Were you paid?

A No.

Q Were you ever on the production staff of Hee-Haw?

A Hee-Haw? No.

Q Were you an observer of the productions of HEE-Haw?

A No.

Q How about Laugh In? Were you on the production staff of that show?

A No.

Q Were you an observer of the production of that show?

A I have seen them tape their shows, yes.

Q How frequently did you observe them taping the show?

A Three or four times over the years.

Q Did you observe any other aspects of the production of that show?

A I believe I was in their editing room once, yes.

Q How about the Glen Campbell Show?

A Yes. Yes, I have seen the show taped. Yes, I was very familiar with their production organization and staff. No, I was not on their staff.

Q Well, what do you mean, you were familiar with their production staff?

A Well, in our business it is very usual and typical a thing to do for us to trade business or production knowledge, especially if we happen to be in the same building. In the case of the Carol Burnett Show, I specifically asked that I be allowed to be an observer in order to find out how they ran their organization and why. In the case of the Glen Campbell Show, their executive producer and director was a good friend of mine and we spoke and had lunch together many times, and I observed their productinn in the process of the production many times. They were physically right next door to me. In other words, we physically had our offices next door to one

another and we taped in studios that were across the hall from one another, so it was very difficult not to bump into each other daily and talk about our shows, our guest --

Q How about the Sonny & Cher Show, were you on the production staff of that show?

A Yes.

Q In the same way that you observed the production of other shows, by trading knowledge with the production staffs?

A Well, physically being on the set, in the rehearsal halls at the time that they were doing their show. In other words, the production of a show would involve many, many elements. We would rehearse next door to one another, we would tape next door to one another. In many cases, we would be using the same three cameramen, for instance, might work for one show on Wednesday, another show on Friday. We were using the same shops so our scenery was being built by the same people, as it were. So that in the process of running my own show, I was constantly involved in witnessing those shows, specifically Glen Campbell and Carol Burnett, watching them being run.

I was also friendly with the producers, directors and writers of those shows.

Q Did you attend any of the pre-production meetings

of those shows?

A All of the pre-production meetings on Carol Burnett for the first eight weeks, and I became involved in two or three pre-production meetings on the Campbell Show because I was asked to come in, not because I was a member of their staff. I had done a particular kind of number that they were interested in doing. They asked me how I did it, who I contacted, who were the people involved. It happened to be a Disney production number, to my recollection And they wanted to do that kind of a number, so they asked me to come in and sit in on their meeting, but that would be a typical reason why I might be involved in one of their production numbers.

Q You were involved in one or two for Glen Campbell, is that correct?

A I really don't remember the exact number, Miss Kearse. In whole or in part, probably more than that. Being called in, the ones that I remember. Where I happened to be in the room at the time the production meeting was being held and sat in on it many times. It's a while back. I can't give you exact numbers. I am sorry.

Q You testified earlier as to certain problems that were experienced by shows, including Hee-Hal, Laugh In, Sonny & Cher.

A Problems? I don't know if I used the word, "problems." If I did, perhaps --

Q I think you did.

A Perhaps out of context, it doesn't sound right to me. I was pointing out that Hee-Haw, for instance --

Q I haven't asked you a question about that yet.

A You said did I say there were any problems.

Q Did you not use the word, "problems"?

A I don't remember if I used the word, "problems." They are different. Their problems, in quotes, occur in post-production, not in pre-production, the way they occur with us. It is a different kind of form they use for that show. It's taking in pieces and building the show after the fact. That is my understanding of their operation, as opposed to our operation, where we tape and go top to bottom straight through for a live audience twice.

Q Have you finished your answer?

A Yes.

Q Mr. Vincent, how was your meeting with Mr. Collins arranged?

A Mr. Collins called me.

Q Did anybody inform you beforehand that Mr. Collins would call you?

A No, I don't believe so. As I recall, my partner

received the original call and said that Mr. Collins would be visiting. Exactly where that call came fro.. -- I thought it came from Mr. Collins. That was my understanding from him.

Q Did you have any knowledge prior to your meeting with Mr. Collins about this litigation between CBS and ASCAP and BMI?

A No. He told me about it at that point in time.

As I said, he called me at my office. We had a meeting. He asked me what I did on the Jim Nabors Hour, why and how. He asked me what would happen if this system had been in existence, would you like it and why. I answered his questions.

Q Did Mr. Collins mention that he had spoken to any other program producers?

A No. I believe he told me he was going to. I don't know that he said that he did at the time. I don't know what his schedule was.

I was aware that he was going to speak to other producers, yes.

Q Did you know who they were?

A Not at that time, no. I knew generally who they had to be. But I didn't know specifically who they were.

Q Did you suggest any names to him of producers or packagers he might speak with?

A I might have, Miss Kearse. I don't recall that I did. If he had asked me, I certainly would have given him names of people that I thought would be a good idea to talk to.

Q But you don't remember whether you did or not?

A I am not specifically sure I did. It would seem logical to me at this moment in time that I would have, had he asked me, but I don't remember specifically answering that question.

Q Would you have mentioned Mr. WRight's name?

A Absolutely. If we talked about it. And I would have mentioned Joe Hamilton's name in conjunction with Mr. Wright's name.

Q How about Mr. Sunga?

A Yes, I would have mentioned Mr. Sunga's name.

Q Did you mention anyone else?

A Yes, any number of producers with whom I was familiar at the time. Again, I don't recall that conversation taking place but if you gave me four or five minutes and asked me to compile a list of producers who I respected in our industry, I certainly would have been able to do that.

Q Have you had any conversation with Mr. Wright with respect to CBS's proposed per use system prior to the time you talked with Mr. Collins?

A No. It was after that.

Q How about with Mr. Songa?

A The same. After. After I spoke with Mr. Collins.

Q How long after you spoke with Mr. Collins did you speak with Mr. Wright about CBS's proposed per use system?

A Again, I am sorry I can't give you exact dates, but probably within a couple of weeks. We see each other fairly often, and it would probably have been within a couple of weeks and then again, when we arrived here in New York.

Q Physicall, is your office in the same building as Mr. WRight's?

A Not now. It was.

Q How long ago?

A As of the Jim Nabors Hour which would have been two years ago. Now Mr. Wright's office is still in that building while I am at Warner Brothers.

Q I believe you said you spoke with Mr. Wright in the Cravath offices, is that right?

A I saw Mr. Wright at the Cravath offices and I did speak to him at that time.

Q When was that?

A I believe it was the first day of the trial, Tuesday, your Honor?

THE COURT: Yes.

A (Continuing) We were all here on Tuesday. That is when I saw Mr. Wright. I saw him all day Tuesday.

THE COURT: It was May 1st.

THE WITNESS: It would have been Tuesday.

Q It would have been Tuesday?

A Yes. It was the first day of the trial. We were all here.

Q Were you in court any day last week other than Tuesday, by the way?

A No, I was not.

Q When did you first meet Alan Hruska?

A When I arrived in New York at a meeting, again, approximately two weeks ago, I would say. At the offices of Cravath, Swaine & Moore. I did not meet Mr. Hruska in California, is what I mean to say. I met Mr. Barclay there and Mr. Hruska here.

Q You did not meet Mr. Hruska prior to meeting him in New York prior to two weeks ago?

A That is correct.

I meant to say Mr. Collins.

Q When you met with Mr. Collins in California, you say he described a hypothetical per use system to you?

A Yes, he did.

Q Will you tell us how he described that system?

A Basically what he did was, he told me about the elements of the system as we have discussed them here in court today. And he asked me whether or not I thought or I would like to operate under a system of that kind and why.

To me, personally, I saw certain advantages over that situation -- advantages to me with that system in force and I told him that at that time.

Q Did he describe it exactly the same way we have been discussing it in court today?

A Well, exactly --

Q I don't mean the exact same words, but all of the same features of the system?

A My general feeling of the system has been the same since the first time I heard it. In other words, that it has been described in about the same words.

THE COURT: We found somebody who knows.

Q Did he include as an element of the system that writers and publishers would fill out a form giving names and addresses and telephone numbers of people who could

negotiate for them directly?

A In the event that they pulled their music out of the per use reservoir, yes.

Q Suppose they did not pull their music from the reservoir, did he indicate that those people also would fill out similar forms?

A If they did not pull their names?

Q Pull their compositions.

A My understanding was that the names, addresses and telephone numbers of all of the copyright owners would be there, yes. Did he do it at that time, I am sorry, Miss Kearse, did I understand it now -- did I understand it originally or --

Q I am trying to find out how Mr. Collins described the per use system to you when you first met with him.

A Yes, he did tell me that copyright owners or publishers would be required, in the event they pulled their music out of the pool, to fill out a card, and on that card there would be certain information. The most important piece of information to me was the name and telephone number of someone who was authorized to deal for that particular piece of music and who was expecting my call in effect. That when I called, they would know exactly what I wanted and why.

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Q Mr. Vincent, let me show you a document that has been marked PX 860 (handing).

Have you ever seen a form of this sort?

A Yes, I have.

Q When did you first see that?

A At one of the meetings here in New York. I did not see that one in California. I saw it at one of the meetings here.

Q Could it have been your meeting with Mr. Hruska two weeks ago?

A It was probably this week but it might have been, yes. It might have been. It was here in New York, Miss Kearse. I don't believe I saw that form in California.

Maybe I should clarify the fact that I heard about it in California but I did not see it in California.

Does that help you at all?

Q When Mr. Collins described the per use system to you, did he describe, as a feature of that system, that owners of copyrights would be able to pull their compositions as to particular uses, for instance, as to feature but not as to background and so forth?

A Yes, he did.

Q Did he describe that as an element of that system CBS would have a computer system and producers

would have cathode ray tubes on which they could get information?

A I don't remember the cathode ray tubes. He described to me a situation whereby there would be machinery that would allow me the information very rapidly and I impressed upon him my need to have that information very rapidly and he said that that would be supplied by CTN.

Q I believe you said that the concept of the Jim Nabors show revolved around the use of Broadway songs and standards.

A No, I did not say that. The concept certainly did not revolve around it.

Q I'm sorry. Correct me, then.

A I said that it was generally speaking a typical variety show in which we used comedy and music and music was used in several forms -- solos by our star and guest performers, duets and medleys by both together, an opening production number which was usually built around one specific song and a closing finale production number which generally had many songs in it.

That's the musical form.

The comedy form was in the form of anywhere from two-to-three-minute sketches to sketches that lasted and were runners, that we did every week, 17, 18 minutes.

So, that was the concept of the show.

Within that concept, in terms of the music that we used, we used a great deal of Broadway show music, yes.

Q Were there other programs on CTN at the time that used the same concept?

A The same concept? I would have to say yes. Most musical variety shows are fairly cut and dried operations, with the exception of, again, the ones that unusual, like, I think, Laugh-In. It's an opinion that I guess I can state.

I think Laugh-In would be an unusual show. It was a different show when it came out. It was done differently, it looked different, it had a whole different feel.

Of the shows that were on at the time on CBS, which means the Jim Nabors Hour, the Carol Burnett Show, the Glen Campbell Goodtime Hour -- and I don't think Sonny & Cher was on at that time; that was a little different -- those shows had the same general feel.

Some of those shows used a little more music. In the case of Carol Burnett, a little more comedy. We were about in the middle of those shows.

Even when the Flip Wilson Show came on, which was opposite us, it had a different look and different feel that basically used the same elements in a different

way.

THE COURT: Would you say the same thing was true of the Bill Crosby Show?

THE WITNESS: Your Honor, I never saw it, not once.

Q Mr. Vincent, how much of the music that was used in the Nabors Show was composed by your staff?

A By Mr. Scott? Not very much. Mr. Scott would probably be involved in, as I stated earlier, the setting up of a musical production idea.

Now, that might involve anywhere from 15 or 20 seconds of music, perhaps, to a minute or a minute and a half of music, depending upon what Mr. Scott felt the time he needed to setup the concept that he wanted was.

But it was used as set-up music, to get us into the more familiar music that we felt our music wanted to hear.

Does that answer your question?

Q I believe you said that the musical director of the show composed some bridges and play-ons and music of that sort, is that right?

A Yes, he did. Paul Weston was his name.

Q How were the synchronization rights for the music composed by Mr. Scott and Mr. Weston cleared?

A He had them for that run on the basis of the fact that he was working for us on our staff.

Q From both of those gentlemen?

A Well, there were no synch. rights per se involved with the play-ons and play-offs, to my knowledge.

THE COURT: Why is that?

THE WITNESS: Well, I am just thinking about what I just said and, obviously, that's not true. I retract that.

A (Continuing) On the basis of our original deal they had the synch. rights and they were working on our staff at that time. In other words, there was no Bernie Brody involved in that transaction.

THE COURT: Just as a matter of curiosity, when you say they had the synch. rights and they were working on your staff at the time, are you implying that they were there for direct negotiation or that you didn't have to negotiate with them because they were your employees?

THE WITNESS: They were our employees and we did not negotiate.

THE COURT: You had the right because they were your employees, to use synch. rights for your show?

THE WITNESS: That's right.

Q Was that part of your contract?

A Well, again, in our business we talk about what

is normal under given set of circumstances.

To my knowledge, that particular item does not exist in a deal memo anyway. It may, but I never personally saw it.

Q Did you have an oral understanding that that was so?

A That is the normal situation in our business so, therefore, there would be that understanding, whether it was stated or not.

In the event that that was not the situation, that's when it was typical to discuss the situation, if it is not --

THE COURT: In other words, the customs or norms of the business. They are with regard to unwritten material and if there is something special, you might write it down, even in your industry?

THE WITNESS: That's right. We would then discuss that particular situation, even in our industry, was, etc.

THE COURT: Let's take an afternoon recess.

(Recess.)

BY MISS KEANE:

Q Mr. Vincent, you stated, I believe, that with respect to the show "The Little People" much of the music

is background music and is composed by Jerry Fielding and that right?

A Yes.

Q If CTN had no license from ASCAP or BMI, and that show were on CTN, would you expect to be in a position to negotiate with Jerry Fielding for the music performance rights for "Little People"?

A Let me see if I understand your question, Miss Kearse.

In the event there were no blanket license, would I be in a position to or would I negotiate with Mr. Fielding at that point in time for the performance rights that he was not receiving from ASCAP or BMI?

THE COURT: That you were not receiving or that the network was not receiving.

Q Assuming that there is no performance license between the network and --

A CTN, and it were on CTN?

Q Yes.

THE COURT: Just for fun, why don't we keep it with NBC and assume that NBC doesn't have a license and CTN does.

A NBC has no license?

Q Right.

A Would I negotiate with Mr. Fielding?

THE COURT: How would you get the performance rights.

Q Yes. Could you get the performance rights directly from Mr. Fielding?

A I don't know exactly how. I assume that would be a negotiable element as of the time we made that deal. I don't know. I have never been in that position.

Q But you would expect that would be feasible?

A I would think so, sure.

MISS KEARSE: No further questions.

REDIRECT EXAMINATION

BY MR. HRUSKA:

Q That musical comedy that you referred to, Mr. Vincent, that you wrote some years ago which opened in Chicago and closed in Chicago, have you ever written any other songs?

A No, sir. That was the only time I was involved in writing, lyrics, specifically.

Q How many songs did you write the lyrics for in that show?

A I think it was probably in the vicinity of 13 songs, 14 songs, somewhere in that area.

Q Have you received ASCAP distributions since 1964

in respect of performances of those songs?

A Yes. I receive a quarterly check from ASCAP.

Q Do you remember how much the quarterly check usually amounts to?

A Well, almost nothing. I mean it amounts to $2 or $3, or whatever it is.

MR. TOPKIS: I think we have the information, if you want it, that is if this gentleman is Warren Edward Vincent.

THE WITNESS: No. Edward Duke Vincent, and I believe they carry me hyphenated.

MR. TOPKIS: Who is Warren Edward Vincent, getting so much money from ASCAP, $23 last year?

THE WITNESS. $22.

MR. TOPKIS: 23. I mean no disrespect, Mr. Vincent, but a phone call --

THE WITNESS: That sounds like it might be the amount of money that I received last year, but Warren Edward, I really don't understand. It should be Edward Duke Vincent.

I am sure the name was confused.

THE COURT: Doesn't ASCAP have the fingerprints of its members?

THE WITNESS: That sounds like the figure, Mr.

Topkis. I don't know why the Warren, but they do have me as Edward Duke Vincent, I believe. They may have hyphenated my last name.

There was some confusion at one point in time, but certainly, $22 sounds like a reasonable figure. If you checked it out, I am sure that is me.

MR. TOPKIS: Well, don't be too much in despair. In 1970, that was a greater year, and you got $48 that year, according to our information.

Q At some point in the cross-examination by Mr. Topkis, he was asking you a question concerning problems you might encounter in a by-pass situation: that is, when you are producing a CTN program and CTN does not have an ASCAP or BMI license and NBC and ABC does.

You had started saying something about every day you all agents and then there was an objection or an interruption and you never finished.

Do you remember the point you were about to make at that stage?

A No, sir, I don't.

THE COURT: It's just as well, because I don't remember if I sustained the objection.

THE WITNESS: I might, if you will allow me, your Honor, take a guess, if you want.

THE COURT. Don't guess, please.

Q There was some talk, also, during cross-examination about who publishes various music that was written especially for the Jm Nabors Hour or Little People, and you answered with the names of various publishing companies.

Do you know whether those publishing companies which were either related to -- that is, owned by the writer of the music or related to the production company, actually published any sheet music of that music?

A No. We don't talk in terms, your Honor, of publishing in terms of the sheet music. There was no sheet music that ever went out, per se. That's not the way we use the term.

Q You use the term simply to refer to what, then?

A To refer to who has the copyright at that moment in time.

Q Which publishing entity holds title?

A Retains the rights to that particular piece of music.

MR. HRUSKA: No further questions.

THE COURT: Well, did you get any report, Mr. Hruska?

MR. HRUSKA: Yes. We have a file and it is

not terribly voluminous, and that removes my concern. I would say, your Honor, my only concern was the prospect of, tonight, having one more rather large job piled on us but it turns out not to be so bad.

THE COURT: Let us talk for a moment about what we should do in regard to Mr. Vincent.

I think it would be sufficient if he would stand by a telephone around 10 o'clock tomorrow morning, so that we can let you know if we need you back. I am sure it will be brief, if we do.

Can you make your plans so you don't plan to leave until the early afternoon, for example?

THE WITNESS: I will do so.

THE COURT: Please advise Mr. Hruska what telephone you will be at around 10 o'clock tomorrow morning and stay there until you hear from him one way or the other.

THE WITNESS: Yes.

MR. TOPKIS: Do I gather that the file will be in court tomorrow morning?

THE COURT: Yes. About a quarter of 10, please.

If there are any questions, call me in chambers and I will come down.

Otherwise, you are excused for the present.

(Witness excused.)

MR. COLLINS: I would like to call to the stand George Sunga.

G E O R G E A. S U N G A, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

Q Would you state your address for the record?

A 2430 Rinconia Drive, Los Angeles, 90068.

Q What is your occupation?

A I am a free lance television producer.

Q Could you tell us what you do as such?

A As a free lance television producer, I try to execute, as best I can, the concept or idea of the show, to prepare a budget, to hire key creative personnel and guest stars.

Based on that budget, to work with the writers and attempt to interpret what they are doing in terms of my budget and, once I see that everything is falling into place and I have proper answers, I try, then, to execute the best final product I can, based on that.

THE COURT: May I ask a question just for my general education?

In the creation of a new show, Mr. Sunga, how is it born? Do you conceive an idea and propose it to

a network or do they tell you that they are looking for a certain kind of show and ask you to think about putting it together or may it happen either way?

THE WITNESS: It may happen several ways in the creation of an idea.

I can work after an idea has been created. A writer may have decided he has a good idea for a special. He may then call me and say, "All right, George, we now need a budget; we have got to know, based on this idea, how much it is going to cost to do this idea."

I will do the budget for him, either through William Morris -- I say that because it's my agency -- we can take that proposition directly to the network and, based on whether or not they like that special idea, because that's what I deal with mostly, they will then come to an agreement and pay us money to deliver to them that program, that special, and I try to give them all the rights that are necessary to put that on the air.

THE COURT: Do they ever get an idea for a special and come to you?

THE WITNESS: Not to me, directly.

THE COURT: Thank you.

Q Would you outline briefly your experience in the entertainment industry?

A I graduated from San Diego State College in 1955. At that point, I then joined CBS Television in Hollywood. I started in the mailroom. My major job, first major job, was as manager of traffic and storage of network films.

In 1960, I became the first production supervisor on the West Coast for CBS. That job was to be the liaison with all the outside packagers, outside producers, who wanted to come to CBS and use their facilities.

It was my job to organize the facilities for them, to answer all the questions they may have with regard to using the facilities of CBS. I held that job from 1960 to 1966 but, in that time, I did my first two jobs as an associate producer.

In 1964, I believe, I did Carol Channing's very first special at the facilities we used at CBS.

I then worked on Dick Van Dyke's first special. The facilitieswe used for that one were at NBC.

In 1966, December, I left CBS and became the associate producer of the Smothers Brothers, the hour, which I did in that capacity for the next two seasons.

In the summer of 1968, Tom Smothers and I co-produced the Summer Brothers Smothers Show, which was the

beginning and which is what was later to become the Glen Campbell Good-Time Hour.

In the '68-'69 season, Alan Blye and I co-produced the third season of the Smothers Brothers, the hour.

Later on in 1969, I was the associate producer of a special called The Singers, a new form musical comedy variety special. This was done for Torme-Foster Productions and it aired on CBS.

Following that, I co-produced Rowan and Martin Bite The Hand That Feeds Them, a comedy special that was done for RoMart Productions, and aired on NBC.

In the summer of 1970, I was the associate producer of the Tim Conway Comedy Hour. This was for Timkel Productions, airing on CBS, and it was a comedy variety show.

THE COURT: I didn't hear the name of the show.

THE WITNESS: Tim Conway Comedy Hour.

A (Continuing) Early in 1971, I was invited by KABC Television in Los Angeles to analyze a 90-minute daily public affairs problem that they were doing. I did so and I wound up producing the show.

In the summer of 1971, I was the associate producer of the CBS Newcomers.

Following that, I went to the Wolper Productions, Inc., and co-produced two musical nostalgia pilots for them, starring the King family and the title, at this moment, I can't remember, the name of that series. That was for syndication.

Early in 1972, I was the associate producer of a situation comedy pilot for Canterbury Productions, called Keep The Faith. This was for Canterbury, CBS-aired.

THE COURT: Who were the participants in that, some of them?

THE WITNESS: In terms of who the characters were?

THE COURT: Yes, the actors and actresses.

THE WITNESS: Howard De Silva and Bert Conby. and it was about the retiring rabbi waiting to be replaced by the young rabbi out of rabbi school.

After that, I went back to the Wolper organization and was the associate producer of Of Thee I Sing, which was a 90-minute television adaptation of the Broadway musical.

THE COURT: Very good, too.

THE WITNESS: Thank you.

A (Continuing) That was for Wolper, and it appeared on CBS.

Following that, I went to NBC and co-produced a Fred Astaire special called Make Mine Red, White and Blue, an Americana special, more than a patriotic special. That was also for the Wolper Association and aired on NBC.

I went back to the facilities of CBS to do Don Rickles Alive and Kicking, a comedy, musical special for Mindy-Beth Productions, airing on CBS.

I went to Tomorrow Entertainment next and was the associate producer of a new situation comedy pilot called Andy Capp. This was an adaptation of the British cartoon. It was for Tomorrow Entertainment, and to air on ABC.

After that, I co-produced Hotel 90, which was a new form of musical comedy variety special. That is to say, it did not have a host. We had guest stars and we simply discovered them and they led us into the next bit of action, next bit of comedy or music.

That was done for CBS and it was on CBS air.

Following that, I was the associate producer of We'll Get By, a new situation comedy pilot created and written by Alan Aldo. That was for Helix Productions, for CBS.

Q Mr. Sunga, have you ever participated in the process of negotiating a package deal with a network?

A Not directly, but I have had to prepare the information and budgets necessary to conduct those negotiations.

Q Do you know what the packager sells to the networs?

A It sells to the network that special. All the production and creative personnel necessary to do that special. All the rights, as I said, necessary to do that special. Gives that to the network and supplies [illegible] elements.

Q How does the packager determine price at which he is willing to sell to the network the rights to the program.

A That's part of what I must do. I must create a budget based on what I feel that special costs, how I can best produce that special and, for X amount of money.

I try to break down each production element as I can see it in that special, put a money figure to that and, with that, we come up to the total price of the package.

It also contains, of course, an area for profit.

Q After the deal with the network has been made, what are you responsible for delivering to the network?

A After the deal has been made and I have now produced that show?

Q Yes.

A And try to give to the network, then, the special, and in giving them that special, I have to provide all the rights to air that special, except music performance rights.

Q Are synchronization rights included?

A Yes, they are.

Q After the deal with the network is made, what do you do next?

A Now we produce the show.

Q Mr. Sunga, you mentioned that you have produced a number of variety specials. Could you outline for us the basic steps in that process and indicate, as you do, the timing of music selection?

A I shall try. Once we have the idea of the special, the concept of it and once we have decided upon the writers, from that moment, specials that I have been involved with take about six weeks to do from the first beginnings of the script to the final day of taping.

The first in that schedule, it is to get together with the writers, try to interpret on paper the idea of the show. Now, besides the writers and, in this case, I think we can talk about comedy writers, there is another ingredient that we try to incorporate at this time and that is the special musical material writer or writers.

It is necessary for us now to put our heads together and try to integrate into that special the best elements of comedy, the best elements of music and, in case of special musical material, the writers, we are deciding

what special material we are going to need.

As in the case of Hotel 90, we wanted to be able to set the opening production number and the premise behind that special quickly, so that the opening number was in fact a piece of special material explaining what goes on in the hotel, people coming, people going, that kind of a flavor.

It was up and bright. The way we -- as a matter of fact, we also used that same song as the finale or closing number.

THE COURT: Was that a number written for the show?

THE WITNESS: Yes, it was, sir.

A (Continuing) Now that we have gotten started on the written word and getting an idea where we are going to go in terms of the music, I am at this time also attempting to clear and to hire the director, choreographer, costume designers. These are people who I must now make sure I have available and will be able to do our show.

I am, as the script is being developed, looking at all the either the musical production ideas that are being recommended by the writers and see if it's feasible in terms of my original budget -- can I really afford to do certain things in the show; will the scenery requirements be too much for what I feel we can do and can afford in the

show.

If I have already now hired my guest stars and if they are musical guest stars, this is all within the first three and a half to four weeks of schedule.

I am now conferring, finding out what musical material they, the guest star, would like to do. At the same time I may be -- I will measure what they are recommending to me in terms of how it will fit into the special.

Then I may recommend some numbers, myself, to the guest star. I am trying to -- by the end of the fourth week, I am trying to have all my basic information down

Maybe the majority of the music shoud now be set, by the fourth week, because I will now start in the special, a very important element of rehearsay. I must now sketch the dance numbers based on the music that we have selected.

In this fourth week, I am going -- I am attempting to clear my sinchronization rights so at least I know that I have that bit of music set.

In the fourth week, I am sketching. I must have the right answers on music and, following that, the dancers now can begin, because now we know how we want the dance number to be. That is the choreographer, the sketches with the dance arranger. They may take bars of music and

say "we wish to do this in up tempo, let's take this in waltz" and maybe I want to recommend another song, build a medley for a dance number.

All this happens by the fourth week.

By the fifth week, I may bring principals in to start rehearsal and integrating dance and principals, because by the sixth week, at the end of the sixth week, I will have gotten on stage, I will have taped the special.

Q You tape the special during the sixth week --

A Towards the end of the sixth week.

THE COURT: Would you say an analogy could be made between your role and that of the general contractor who bhilds houses for a specific sale? It sounded like that to me. You put it all together and see if somebody will buy a proposed project at a proposed price?

THE WITNESS: When I start out that way, I propose what I feel will be a good idea. I can do that by myself or in conjunction with a writer. I can try to develop an idea that I feel the network may be interested in. If it's a special, as we are talking now, and then it's a go, I will, to the best of my ability, bring the best craftsmen I can to produce that special with me.

THE COURT: I take it nobody ever produces a package on television, special or otherwise, on speculation;

that is, in advance, and then try to seel it; is that right?

THE WITNESS: I have not heard that.

THE COURT: Too much money involved.

Q What factors do you take into consideration in deciding on what music you want to use for a variety special?

A As I have tried to point out, my first requirement really is to consult with the guest star, who -- with the musically inclined guest star, to find out what kind of material they would like to do on the show, so that in fact, one of the first areas I will get will be from the guest star.

I will look for music that will give the show balance. I will -- it may be also in the form of a musical act, as in the case of Hotel 90 we featured a group called Bread.

Bread did an up tempo number and a ballad for A musical number may stem from a production idea. It may stem from putting two singers into a barroom set and all of a sudden, what I need there is a medley of saloon songs.

The musical, special musical material writer and a musical director may recommend songs to me that may fit the concept of that special.

Q Do you ever take into consideration that the song has recently been done before?

A Yes, I do. We are trying to find a uniqueness and a freshness in how we approach music or comedy in a special.

If I might go back and cite an example with Bread, Bread recommended three songs for us. One of them was "if," which was Bread's first big hit. It's a lovely ballad song.

Yes, it would have been right to use "if" as performed by Bread, but by now, that's a very, very familiar song for us who keep close tabs on it.

That is why my inclination was to go in terms of a song called Aubrey, which was a tune that was climbing in the charts. I felt that had great value and it was a ba!!

Q Could you give us an idea of the average number of compositions that you used on variety shows in the past?

A Let me talk about a variety special and, in this case, if it's a comedy-oriented special, I may use possibly 15 titles, but on a music oriented special like Hotel 90 was, the best I can remember is we probably used about 30 to 35 titles; pieces of music.

MR. TOPKIS: I'm sorry, your Honor. I thought the witness mentioned the name of a program.

THE COURT: He said if it was comedy oriented it would be 15 titles; if it was music-oriented, it would be

30 or 35 titles.

MR. TOPKIS: Thank you, your Honor.

Q What types of music would you use?

A Standards. Old chestnuts, familiar tunes. We use show tunes. Both from Broadway as well as motion pictures; try to use current very popular tunes and music that may be specially written for the special.

Q Has anybody at CTN ever played any role in the selection of music for any program which you have been associated with?

A No.

Q Has anybody at CTN ever played any role in the selection of a composer to write the special musical material that you have been associated with?

A No.

MR. TOPKIS: Your Honor, would it shorten matters if I were to offer to stipulate that Mr. Sunga's testimony, if continued at length, would parallel the testimony offered by Mr. Vincent?

THE COURT: I guess that question is addressed to Mr. Hruska. I can't tell you if it will shorten matters. I think you may wish to consider it, though. Why don't we shorten distance the rest of the day and then see whether it is necessary for Mr. Sunga to return or not.

Q Could you tell us, Mr. Sunga, how you go about selecting people to write special musical material for a musical variety special?

A Obviously, I try to find the best person available to use. They are a very unique kind of group. They have to be able to write with very little prompting on the kind of material that we need in a special. They have to write fresh melodies, fresh, bright lyrics for us, and they may have only a chance to talk with us once and, as we set up a situation where we may tell them at this point the kind of music we need, better set up the whole show for us.

The show is about a hotel and big Manhattan or a metropolis, give us the feeling of movement and the like.

Well, there are few people that can do this kind of work that we can say, "this is the kind of material we want; now, do it," because the next time I may hear that material will be when we are prerecording the music, when it has already been arranged and I may not hear it until that time.

THE COURT: What happens if you don't like it?

THE WITNESS: There are very few times in the experience that I have had with the people I have been working with that we have not liked it. What happens if we don't like it, depending on the nature of it, we may want

to change a few things.

I may have to readjust orchestra or how I wish to use the orchestra, either in a prerecording session or as we go to it in their participation with the show live.

That is in the studio with us, having finished the prerecording.

Yes, it can get a little touchy. We do try to keep in touch but sometimes the only times I hear that melody or the lyric -- melody particularly will be at prerecording.

Q Do you feel that there is competition for the service of people who write such music?

A Quite definitely. I think that, for instance, on the Laugh In, there is a bright young man by the name of Billy Barnes. He is very good, very good special material writer.

Ray Brown, I believe, worked on -- Earl Brown, excuse me, worked on Bill Cosby. Ray Charles, the person that we used on Hotel 90, is not busy-- was not busily engaged on a series, so he was available.

Artie Malvin, who does that kind of work for the Carol Burnett show, is working with Carol but we were able to work out his schedule so he could come and help us, too.

There aren't very many of this type of artist.

Q How much do you pay for the services of people who write special music material?

A In the area of the special, I have paid $3500 to $8500.

Q Is that just for writing the music?

A That is for their talent only. For writing the music for us. I might explain that some specials are ninety minutes as well as an hour long and that, too, will affect the pricing with that individual.

Q You mentioned earlier that one of the things you did during your first three and a half to four weeks of your production schedule was to clear synchronization rights for music which you wanted to use.

A Yes.

Q Could you tell us how you went about doing that?

A If I had my song selections --

THE COURT: I guess it's the same story of getting in touch with Mr. Brody's agency?

THE WITNESS: I will put in Mary Williams, however. It's Bernie Brody or Mary Williams. I work with both these people. And it also stems from one of my production assistants who can talk to these people and give them the information regarding the use of music.

Q Is it also true that you obtain these rights

before you have taped the program?

A Definitely.

Q Could you tell us why you do it?

A I like to deal out in front, not after the fact. I would be in a very peculiar business position to try to deal after the song has been put into the show.

THE COURT: You don't sell short.

Q What is the normal price range for synchronization rights?

MR. TOPKIS: For what?

Q For music that has been used within the show you are working on. On a special.

A From $50 to $150 for a five-year world-wide usage.

Q Have you ever been exposed to higher prices?

A Yes, I have.

THE COURT: Besides "Happy Birthday"?

THE WITNESS: Yes, besides "Happy Birthday." I know we mentioned the Beatles. The Beatles, yes, it's a higher price. As I remember, it was $350, the title. There has been some songs that have European copyright which can go to $1,500, I have been faced with.

Another situation was some of the material that was done by Steve Allen, was $350. I say that because he

was on the show and I wanted to use three play-ons for Steve within his activity in the show, and I talked to Steve and I told him that it cost $350 per title, and he said, "Well, why don't you just pay the first one,"which is the most identifiable with Steve,"and I'll call my lawyer and we will negotiate a lower price for the other two." Which, as I remember, was done.

Q Can you give us any other instances or any other reasons for which you might negotiate, as you did with Steve Allen for the synchronization rights?

A For synchronization rights, it simply may mean that if I know I am only going to use eight bars of a song, or something less than full usage of the song, I would attempt to negotiate a more equitable price based on its usage. Based on the fact that it may be only piece of a medly or maybe simply only a play-on. Then I think I have a point in going and asking for a lower price.

Q What happens if you can't negotiate what you feel is a more equitable price for the synchronization rights?

A If I can't, I will look for an alternate.

There was a case with the European publisher, on the Tim Conway Comedy Hour we had constructed a circus finale and within that circus finale we wanted to use certai

bits of music. One of the music, I cannot recall the title of that, was held by European copyright and was for an extreme amount of money. Certainly in terms of what I am used to pyaing for synchronization rights, so I simply substituted a different piece of music, which still gave me a circus feeling, and I don't think I suffered and I didn't have to spend that much money.

Q Well, why would you decide to use a less expensive alternative as you did in that case?

THE COURT: Isn't that fairly obvious? We all want to go to the cheaper alternative if it was satisfactory.

THE WITNESS: If it was satisfactory, yes.

THE COURT: What intrigues me is how some of these European songs can have a $1,500 price and expect you to pay it. Is the whole scale higher in Europe?

THE WITNESS: I am not that familiar with it, but if they feel that that show will have a chance of playing in Europe and if I want that show to play in Europe as part of what happens to a show, a syndication if it's through playing on the network, that is a very expensive fee because I don't think that money approaches that amount when you put a show in Europe for a play. That would just about eat up what the cost of syndicating that

show in Europe would be. So that is why we try to go for lower.

Q Can you tell us what you would do with the money you saved by using the less expensive alternative?

A Obviously I can use it -- I have the ability of using thatmoney within my own production with my other elements. It could affect my use of building a more elaborate piece of scenery --

COURT: Did you hear Mr. Vincent's testimony --

THE WITNESS: He said hire dancers.

THE COURT: Would your testimony differ materially on that point?

THE WITNESS: Not at all. That is part of our trade. We do that constantly.

Q You think that decision is one which inhibits the creative quality of your show?

A Absolutely not. I think that to be a good producer, I think you have to know the territory and you have to be able to know what works and what doesn't and how to make things work and for how much. I think the days of an arbitrary decision are over in television. We really have to be armed, we have to know what we are dealing with and especially in costs.

MR. COLLINS: Your Honor, at this point I would propose to read into the record the statement given during

Mr. Wright's testimony as an assumed set of facts for a per use license. Shall I proceed with that now?

MR. TOPKIS: He didn't do it last time.

THE COURT: I know we didn't, but I prefer it to be read to the witness so we know how it's being done. The only question in my mind is whether this is the time to get started on that.

I would like to see counsel briefly in the robing room before we do that.

(In the robing room.)

THE COURT: In the robing room discussion the counsel and the Court have been reviewing the issue raised by Miss Kearse this morning with regard to her request that the Court instruct CBS to phrase its proposal specifically, that is, to exclude alternate proposals, and the Court has indicated that it does not believe that CBS should be required per se to exclude alternate proposals provided that, number one, as to any proposal there are not more than two alternates; number two, that to the extent any alternate proposal surprises a defendant in the legal sense, that defendant be given such time or other protective assistance as is necessary to overcome the surprise; and number three, that proposal of an alternative not legally prejudice any defendant.

Nevertheless, the Court does urge CBS to exclude alternate proposals to the maximum extent feasible and instructs CBS no later than Wednesday morning to supply to the Court and defense counsel a written version of CBS's proposal as it has developed to this date.

Anything else to be added to that at this time?

MISS KEARSE: I don't think so.

THE COURT: Mr. Hruska, your housekeeping, does this need to be on the record?

MR. HRUSKA: I don't think so.

(Discussion off the record.)

(Court adjourned to May 8, 1973.)

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Re: CBS v ASCAP, et al.
69 Civ. 5740

Mark Belnick, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison

Robert Sondak, Esq.
Cravath, Swaine & Moore

Craig Bowman, Esq.
Hughes, Hubbard & Reed, Esqs.,

Gentlemen:

The following corrections agreed among counsel are hereby filed with the clerk to be incorporated with the trial proceedings for the dates of May 7, 8, 9 and 10th

Date	Page	Line (s)	Error	Change to
May 7	564	12	Honor, please	Honor please,
	566	15	price	prices
	567	16	songs and it	songs or it
	568	14	wehave	we have
	568	22	will	won't
	571	15	calle	called
	574	25	whose	whole
	579	14	1958	1968

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Date	Page	Line(s)	Error	Change to
May 7	585	9	upright	upbeat
	587	6	because	but
	590	12	creats	creates
	596	13	bards	bars
	596	14	modd	mood
	596	23	chargs	charts
	598	21	man	main
	599	3	t so, if	set, so, if
	600	21	any other area	in other areas
	601	14	runs	reruns
	606	22	place	case
	608	11	hereon	here on
	610	2	particularelement	particular element
	611	12	are your	re at your
	612	13	positive	posited
	612	24	time	point
	615	9	in in	in

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Date	Page	Line(s)	Error	Change to
May 7	615	13	buy	guy
	618	18	theshow	the show
	619	2	cyc	white
	634	6	into a -	into a situation
	645	10	headshow	good show
	658	23	incluyde	include
	659	22	Banors	Nabors
	668	8	keepint	keeping
	672	15	move around	move money around
	674	4	La Manchu	La Mancha
	676	25	Stein	Styne
	677	22	Stein	Styne
	678	10	Stein	Styne
	678	11	Stein	Styne
	682	2	there an	there is an
	686	20	because	delete "because"
	687	15	wamt	want

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Date	Page	Line(s)	Error	Change to
May 7	692	7	documented	documentary
	693	4	wold	World
	693	24	gas	was
	697	9-10	nohwere to do	nowhere to go
	699	2	withdraws its	withdraws from its
	699	12	they pull out	the pool of
	699	13	wishes to	wish it to
	700	7	night	tight
	700	24	Gerry	Jerry
	704	2	synckhing	singing
	704	3	synckhing	singing
	708	18	HEE-Haw	Hee-Haw
	711	24	Hee-Hal	Hee-Haw
	714	13	WRight's	Wright's
	715	2	Have	Had
	715	6	Songa	Sunga
	715	15	Physicall,	Physically,
	715	16	WRight's	Wright's

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Date	Page	Line(s)	Error	Change to
May 7	721	14	diffe rent	different
	722	4	Crosby	Cosby
	722	17	our music wanted	our audience wanted
	723	2	He	We
	728	17	all	call
	733	20	facilitieswe	facilities we
	736	22	Aldo	Alda
	737	3	networs	networks
	737	4	seels	sells
	740	15	rehearsay	rehearsal
	740	19	sinchronization	synchronization
	741	14	bhilds	builds
	742	2	seel	sell
	743	9	"if"	"If"
	744	24	shorten distance	go a short distance for
	746	3	readjust orchestra	readjust the orchestra
	750	5	pyaing	paying
	751	7	thatmoney	that money

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.	69 CIVIL 5740

New York, May 8, 1973

STENOGRAPHER'S MINUTES

COLUMBIA BROADCASTING SYSTEM
vs.
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, ET AL.

69 Civil 5740

New York, May 8, 1973;
10.05 A.M.

Trial resumed.

- -

THE COURT: Mr. Topkis.

MR. TOPKIS: If your Honor please, I think the first matter that we ought to consider is the question of that witness who is hanging fire at home waiting for a phone call.

THE COURT: Mr. Vincent.

MR. TOPKIS: Mr. Vincent; right.

We have received from counsel for the plaintiff what they tell us the total file dealing with the negotiations.

THE COURT: I suppose the words "tell us" could be beefed up by saying "represent."

MR. TOPKIS: No, I don't think that that would be accurate, your Honor. I think rather that we have been told that the files of the legal department and the business affairs department were checked and this is the result of the checking.

But going through it, I notice reference is to

drafts, reference is to at least a dozen different people getting copies of various documents, which suggests to us, without laboring the point, that a more intensive and perhaps more time-consuming search might produce more rewarding results.

I have no desire whatsoever to keep Mr. Vincent hanging fire. He told us, as I remember it, yesterday that he is from time to time in and out of New York; he has a sick mother, apparently, and has to come here to see her.

This trial is going to be going on for a while. I don't see any reason why we should hold him up from his scheduled return while a thorough search is made for this file. I would like that search to be made. And whether we will then want to talk with Mr. Vincent further or not will have to abide the event.

THE COURT: Let's take one thing at a time.

I will authorize CBS counsel then to call him and tell them that he need not stay here but that we may wish to recall him and he should keep in touch with Mr. Hruska as to when he could be available.

Insofar as checking the files further is concerned, I will look over the document that you've got at lunchtime to see whether I agree with your view that there should be a further search.

MR. TOPKIS: Very well.

MR. HRUSKA: May I make a very brief statement on that, your Honor?

THE COURT: Sure.

MR. HRUSKA: We did yesterday, as your Honor recalls, from court have Bob Sondak call up CBS and tell them to send down all the files that have been asked for.

THE COURT: Right.

MR. HRUSKA: And we did get counsel this file. It is a thin file, no question about that, and Mr. Topkis is quite right that some of the documents in here do refer to a revised draft, which we didn't get and we don't have.

The main point I really want to make is that the only two places in CBS where I believe a file on this transaction for the Nabors Hour would be in the law department or in the business affairs department. Those are the only two departments that have come in contact with the negotiations for this package deal.

THE COURT: What follows from that?

MR. HRUSKA: Simply that I don't know that there is any place to look beyond those departments. I would be happy to go back and doublecheck, myself, and say to these people, "Is there any other conceivable place where a piece of paper concerning this transaction could be located?"

THE COURT: Then I understand what you are saying is that you agree that it appears that at least there once was some other papers?

MR. HRUSKA: Oh, I think that's clear.

THE COURT: And that it is just a question of checking wherever it would be reasonable to check, and if they are not there then they are not there?

MR. HRUSKA: Yes, your Honor.

THE COURT: All right.

Are we ready to proceed with Mr. Sunga, our witness?

Would you resume the stand, please.

MR. HRUSKA: Before Mr. Sunga takes the stand, your Honor, I don't recall whether we had the stipulation --

THE COURT: We did not. After yesterday's court proceedings, in the robing room counsel met with the Court and stipulated, as I understand it, that if Mr. Sunga's direct examination had been completed the substance of the totality of his direct examination would have been the same as that of the prior witness Mr. Vincent, is that correct, and Mr. Wright?

MR. HRUSKA: Right.

MR. TOPKIS: I would rather confine it to Mr. Vincent, your Honor. I really would pin it to one rather

than two. For all I know, there may have been some slight disparity.

THE COURT: Well, yes. But we are talking in terms of substance in any event.

MR. TOPKIS: True.

THE COURT: All right. We have a stipulation as to Mr. Vincent, and I may say myself I found the substance of Mr. Vincent's and Mr. Wright's testimony to be essentially equal.

Miss Kearse, is that stipulated?

MISS KEARSE: Yes, your Honor.

THE COURT: I understand there is some short cross-examination counsel wish to make of Mr. Sunga.

G E O R G E A. S U N G A, resumed.

CROSS EXAMINATION

BY MR. TOPKIS:

Q Mr. Sunga, I am not sure I got the calendar just straight. For how many years were you on the CBS payroll?

A From 1955, September 6, to December 26, 1966.

Q And as of today your business is that of creating independently produced television shows for sale to networks?

A Yes, sir.

Q And one of your three customers is CBS?

A Yes, sir.

Q On the most recent special which you produced -- that was something about Red, White and Blue? What was the exact title? I don't have it. Make Mine Red, White and Blue?

A Yes. That was for the David Wolper organization.

Q Broadcast on NBC?

A Broadcast on NBC.

Q Right. On that program there was a performance of Ballad For Americans.

A Yes, sir.

Q Written by John La Touche and Earl Robinson.

A Yes.

Q Did you negotiate the sync rights for that performance?

A That was handled through the business affairs office of the Wolper organization.

Q Do you know the price that was paid?

A I don't recall, sir.

Q Would the figure $6,000 refresh your recollection?

THE COURT: "Six," did you say?

MR. TOPKIS: $6,000.

A I couldn't tell you accurately. But it sounds like that would have been it.

MR. TOPKIS: We have no further questions.

Thank you, Mr. Sunga.

THE COURT: That was for sync rights you were talking about?

MR. TOPKIS: That's right, your Honor.

THE WITNESS: I'm sorry that I didn't understand the question.

THE COURT: Well, let's be sure. The witness says he didn't understand the question.

A (Continuing) In terms of sync rights, is that correct?

Q Yes, sir.

A Then my answer to that was I did not handle that negotiation myself and I can't say if it was for sync or performance rights, and it was done by the business affairs and the Wolper Organization.

I joined that special after it was negotiated.

Q I see. The performance rights were cleared

through ASCAP.

A Performance rights were initiated and cleared by that department of Wolper. How they cleared it, I can't tlel you.

Q Is it your suggestion that possibly the performance rights were cleared directly?

A I don't know, sir.

Q You just don't know?

A That's right.

MR. TOPKIS: I have no further questions.

CROSS-EXAMINATION

BY MISS KEARSE:

Q Mr. Sunga, I believe you told us yesterday that from 1960 to 1966 you were CBS's production supervisor, is that correct?

A That's correct.

Q And you were liaison with outside production companies?

A That was my job, to work with the outside companies coming to CBS to do their shows.

Q And what were your duties in that position?

A I would be the one singular person that an outside production company could come to. If they were from New York coming to the West Coast, I would be assigned to their

show. Basically, any questions that they had in the setting up of the production or the facilities, how to get anything with regard to the production, that was what I was there for. I would then try to schedule the facilities, and with what minor budgets we had to work with, I would try to do it for that budget.

Q What companies did you deal with in that position?

A In that position -- it will take a little while. Password was the first game show that I worked on that came west. Person to Person, Ed Sullivan. It may be confusing to describe outside packagers. They may still be CBS, but they are not located on the West Coast, so they are coming to use our facilities.

There have been on occasion other companies. Jack Jones first special, for instance, came to us to be videotaped at Television City although it aired on ABC.

Q Did you have dealings with Metro-Goldwyn-Mayer Production Company?

A I don't recall.

Q How about Paramount?

A No.

Q Do you recall whether you had dealings with any of the television production companies that are affiliated with the major motion picture companies?

A They are less inclined to use videotape facilities at Beverly & Fairfax, so to speak.

Are you asking me a question as to when I was production supervisor, between 1960 and '66?

Q Yes.

A I can't recall specifically of any major motion picture company.

Q In the productions that you worked on during the period you were liaison with outside production companies, do you know whether or not CBS provided any developmental costs for those programs?

A We are talking outside shows and I guess maybe if I can define it better or maybe describe it better -- when I say outside packagers, I am talking about, again, Password, Ed Sullivan. These are already organized, were working groups. A special may come in. There was a special called Carol +2. It was a major special for CBS. I helped work on that and I'm sure they -- I don't know where they got their money, if it initiated from CBS or an outside agency.

In terms of specials that are done, that money can originate from the network or it can originate from a sponsor.

Q With respect to the productions you were involved

in, were you aware of any participation by CBS in profits generated by those programs?

A I don't know if I understand the question.

THE COURT: I think the question is whether during the time that you were the liaison you knew of any programs, outside programs, in which CBS shared in any profit.

Is that right, Miss Kearse?

MISS KEARSE: That is right.

A The nature of nighttime television is that if a program airs on a network and the network is selling commercial time, that would be the involvement. I guess it is whatever the network sets for the commercial minute or minutes placed within that special.

THE COURT: I take it Miss Kearse is asking about something else. You said, yourself, that when you produce a program you have an element in there for profit.

THE WITNESS: Right.

THE COURT: That's the profit we are talking about.

Isn't that it, the profit from the production itself?

MISS KEARSE: Yes. I am trying to find out whether any of the programs Mr. Sunga worked on during that period were programs which CTN obtained rights to partic-

ipate in the profit, first-run profit or syndication profit or foreign distribution or reruns, that sort of thing.

THE COURT: That is, as distinct from its own advertising income.

MISS KEARSE: As distinct from its own advertising income.

A The mechanics now may unfortunately become a little hazy. There are some network originated programs, those that are generated by a network -- I may be wrong in saying it -- to the best of my recollection, like Perry Mason, is a CBS owned show, and that is a film show. And because they own it I don't know what happens after that. But that's their right.

THE COURT: Was Perry Mason one of the so-called outside shows?

THE WITNESS: No, it wasn't. I was trying to define the term, maybe allow for myself. Using that as a definition, Hotel 90 is a CBS copyrighted show. It is a special that I had just done in January.

In that respect, because it was owned by the network, whatever business arrangement they have with themselves, that's theirs. I was hired to work on the show. I can't tell you much further than that.

Now, if you are saying way back in 1960 and '66,

I'm afraid my memory doesn't serve me that well.

Q Mr. Sunga, have you had any conversations with Donald Sipes with respect to the proposed per use system?

A Yes, I have.

Q How many such conversations have you had?

A I had one conversation with Mr. Sipes.

Q When was that?

A Early part of April.

Q Was that a conversation in person or by telephone?

A That was a conversation in person.

Q Where did it take place?

A In the law offices of Cravath, Swaine & Moore.

Q Who else was present?

A Mr. Collins and Mr. Hruska.

Q Had you spoken to anyone from the Cravath firm prior to that conversation?

A Yes, I had.

Q Who was that?

A That was Mr. Collins.

Q Where did that conversation take place?

A The conversation took place on the West Coast at CBS Television City, latter part of February.

Q During that conversation, did Mr. Collins mention to you any other producers or program packagers that he was planning to speak with about the per use system?

A No, he did not.

Q Did he mention that he had already spoken to program producers or packagers?

A Yes, he had.

Q And who were they?

A No names were mentioned.

Q He just mentioned that he had spoken to them?

A Yes.

Q Did you give him the names of any people to speak with?

A He didn't ask. I didn't give.

Q How did your meeting with Mr. Collins get set up?

A I was at CBS Television City in the midst of helpint to produce "We'll Get By." My offices were in the building at that time.

I was returning from court and I was going into the elevator and I was told by Jerry Ruben, who is the business affairs man at CBS on the West Coast that someone wanted to talk to me, a lawyer from New York.

Q And did he tell you the subject matter --

THE COURT: You mean did Ruben?

MISS KEARSE: Ruben, yes.

Q -- the subject matter of what Mr. Collins wanted

to talk to you about?

A At that time there was no name mentioned. I can't remember if, in fact, he just said it concerns a lawsuit with CBS.

I don't think at that time I was aware what it was.

Q At that time, were you aware that there was a lawsuit between CBS on the one hand and ASCAP and BMI on the other?

A No.

Q After talking with Mr. Collins, did you discuss the CBS per use system, proposed system, with either Mr. Vincent or Mr. Wright?

A I guess my time element is wrong. I don't know when you are asking when I talked to them.

Q Have you talked to them at all?

A The first time I talked to Mr. Vincent or Mr. Wright was Tuesday, May 1st, when the court commenced.

Q I gather from that that Mr. Wright was not present, then, at your meeting with Mr. Hruska and Mr. Collins at the Cravath offices, is that right?

A With Mr. Sipes?

Q Yes.

A That's correct.

Q At the meeting with Mr. Sipes, did Mr. Sipes tell you that if the CBS proposed per use system would cause you to incur extra costs in obtaining music performance rights, that CTN would absorb those extra costs?

A No, I don't think it was stated that way.

Q How was it stated?

A The fact that if I needed -- well, you are saying that CBS would absorb the cost.

I guess if you are asking me what occurred in that conversation with Mr. Sipes, it was that if I discovered in the execution of the per use system that I needed more money in the area of music performance rights, I could ask him for additional funds.

Q And by saying that you could ask him for additional funds, did he give you to believe that CTN would supply those additional funds?

A Definitely.

Q Outside of Mr. Hruska, Mr. Collins, Mr. Sipes, Mr. Wright and Mr. Vincent, have you ever spoken with anyone with regard to the proposed per use system of obtaining musical performance rights?

A No.

MISS KEARSE: I have no further questions.

THE COURT: Anything else?

MR. COLLINS: I have no questions.

THE COURT: Thank you very much, Mr. Sunga.

(Witness excused.)

MR.HRUSKA: Your Honor, my next witness will be Mr. Albert Berman of Harry Fox Agency.

A L B E R T B E R M A N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HRUSKA:

THE COURT: Mr. Berman, please keep your voice up, so we can all hear you. We are having problems with that.

Q Mr. Berman, by whom are you employed?

A By the Harry Fox Agency.

Q And in what capacity?

A I am the managing director.

Q You kind of run the operation?

A Yes.

Q You are in charge of all that is day-to-day functioning?

A Yes.

Q When did you join the Harry Fox organization?

A About 1944. No, I'm sorry.

Q '49?

A '49.

Q That is what you said in your deposition.

A Right.

Q Could you briefly trace the positions that you held at the Harry Fox Agency since 1949?

A Originally, I was employed as a clerk in the accounting department. We have no stated positions in the office. One just rises by the amount of responsibility.

After about three years, I became the assistant to Mr. Harry Fox and I remained his assistant until he died in 1969, and in 1969 I became the managing director.

Q Mr. Fox was the managing director prior to your assuming that job?

A Yes.

Q What is the relationship of the Harry Fox Agency, Inc., to the NMPA, which stands for the National Music Publishers Association?

A The Harry Fox Agency is a corporation and the stock of that corporation is owned by the NMPA.

Q One hundred per cent?

A One hundred per cent.

Q As a corporation, I would imagine the Fox Agency has a board of directors, is that true?

A Yes.

Q And who are the directors of the Fox Agency?

A A Mr. Alan Shulman.

Q What is his music publishing company?

A He is affiliated with Mills Music.

Q Is that part of a publishing group that has some other n. s?

A Belwin-Mills.

Mr. Leon Bretiler.

Q And his company?

A Shapiro-Bernstein & Company.

Q And the next director?

A Salvatore Chiantia.

Q And his company?

A MCA Music.

THE COURT: "MCA" what?

THE WITNESS: "Music."

Q Also known as Leeds Music? Is that a subsidiary of MCA?

A It's part of the MCA group, yes.

I think that is the total of the directors.

Q How about Larry Shayne?

A Yes. Larry Shayne. I am not certain about this, but if you tell me that he is one of the directors, I will

I just don't know. It could very well be. S-h-a-y-n-e?

Q Right.

Let me just check on your deposition, sir. Where we asked you, on Page 12, Line 21, "Who are the members of the board of the Harry Fox Agency?"

Answer: "Leon Bretller, Alan Shulman and Larry Shayne."

THE COURT: Does that mean in addition to yourself, or are you not a director?

THE WITNESS: I am not a director, no, sir.

Q You are the managing director of the agency but not a member of the board of directors?

A That's correct.

Q And Mr. Shayne's music publishing company?

A Larry Shayne Music.

Q And does that handle the music of Henry Mancini?

A Yes.

Q Mr. Shayne is a partner of Mr. Mancini's?

A I don't know the corporate structure. He might be.

Q The president of the Fox organization is who?

A Mr. Chiantia.

Q Is there a vice-president?

A I think it might be Mr. Bretller.

Q Any other officers?

A I assume there is a secretary-treasurer who might be Alan Shulman, and I don't know for certain.

Q Could you give us a kind of overview of what the Harry Fox Agency does?

A Yes. The Harry Fox Agency represents music publishers in connection with the mechanical reproduction of their copyrights and mechanical reproduction is defined to indicate the recording of their music on records and tapes, the synchronized use of their music on film and for motion picture theaters, and on film and videotape for television use, and for any other mechanical reproduction that might come up, for use on a music bos or Muzak type of use.

Q Is that electrical transcription?

A Electrical transcription is the old name for it.

2B

Q We have, then, mechanicals, mechnical rights licenses which pertain to phonograph records?

A Yes.

Q And tapes.

We have movie rights transactions?

A Yes.

Q What does that include?

A Well, we generally divide it, in the office, into theatric-motion picture rights and television.

Q Let's stay with theatric-motion pictures, for a moment, and then we'll get to television, later.

The theatrical-motion picture license issued by the Harry Fox Agency on behalf of a music publishing company to a producer of a motion picture includes what rights?

A It includes generally world synchronization rights and United States performing rights.

Q That is in one document, right?

A Yes.

Q You have a single license which covers both the synchronization and the performing rights?

A Yes.

THE COURT: Let me ask you this:

The film is made in this country and you give the producer, sync, the rights you just mentioned, and he plays the picture here and then he wishes to play the

picture abroad.

Would he need anything more than what he already has from you? Do the sync rights for a foreign country cover that exhibition?

THE WITNESS: The sync rights will cover the exhibition abroad, not the performing rights. Abroad, the performing rights are taken care of by local performing rights groups.

Q Who license the theatres, as I understand it, abroad?

A Yes.

Q Rather than the producer?

A Yes.

Q I would like to show you, first, Mr. Berman, a document we have marked for identification as PX 561 and ask you to identify that.

A This is the authorization from the music publishers to the Harry Fox Agency to represent them, covering mechanical rights as far as records and tapes are concerned.

MR. HRUSKA: I would like to offer that document in evidence.

MR. TOPKIS: Just a question.

Is it the current one?

THE WITNESS: This the current form.

MR. TOPKIS: No objection, your Honor.

MISS KEARSE: No objection.

THE COURT: Received in evidence.

xx (Exhibit PX 561 received in evidence.)

Q I would like to show you PX 562 for identification. Could you identify that document, Mr. Berman?

A This is the authorization from music publishers to the Harry Fox Agency to represent them for electrial transcription rights.

MR. HRUSKA: I offer that document in evidence.

MR. TOPKIS: Again, is that the current form?

THE WITNESS: Yes.

MR. TOPKIS: No objection, your Honor.

MISS KEARSE: No objection.

THE COURT: What did you say the first one was? Represented for what purpose?

THE WITNESS: For mechanical purposes, for recordings on records and tapes.

xx (Plaintiff's Exhibit PX 562 received in evidence.)

Q Mr. Berman, does the Harry Fox Agency have agreements with publishers regarding the grant of authorization by publishers to Fox for Fox to deal in movie rights or

television synchronization rights?

A No.

Q Is that just an informal understanding?

A Yes, it is.

MR. TOPKIS: Is what just an informal understanding?

MR. HRUSKA: The relationship between Fox Agency, on the one hand, and music publishers, on the other hand, which authorizes Fox to deal for those publishers with respect to movie rights, which is movie performance and synchronization rights and television synchronization rights.

MR. TOPKIS: Well it was my understanding that there was no such authorization, but rather than the Harry Fox Agency had to check back with the publisher in each instance to receive explicit authorization, but I could be quite incorrect.

MR. HRUSKA: That's not an objection, your Honor.

THE COURT: I am glad to have a statement of your understanding. Let's bring it out through the witness by examination and cross-examination.

Q Is it your understanding, Mr. Berman, that your agency is authorized in such fashion to act as a clearing house, handle, whatever words you want to use, movie rights transactions and television synchronization rights trans-

actions between, on the one hand, the publisher of the music and, on the other hand, the user, be it a producer of a theatrical motion picture or the producer of a television program?

MR. TOPKIS: Objection, your Honor. It may be my fault for starting it, but perhaps the best way to bring this out, I would suggest, would be to ask the witness exactly what function the Harry Fox Agency performs.

THE COURT: Instead of what your understanding is, would you tell us what actually happens with regard to these rights.

THE WITNESS: There is no written or formal authorization for the Harry Fox Agency to represent any music publisher. We are approached both by film companies and by publishers to handle their synchronization rights.

When we are approached by the motion picture company, we contact the publisher, we give him the details and then, if he wants us to, we negotiate for him.

If a publisher calls us and tells us that his film, his music is being used in a film, then, of course, we accept that as his authorization to act for him and then we contact the producer and take it from there.

Q Let me understand this, Mr. Berman:

When a motion picture producer calls your agency and says, "I want to use one of the songs that you know is in the Shapiro-Bernstein catalog," do you call up Shapiro-Bernstein and say, "Mr. Bretller," or whoever it is that answers the telephone, "do we know have authorization to act with respect to this request by the producer," or do you say to Shapiro-Bernstein, "What is your quotation"?

MR. TOPKIS: Objection, your Honor. From the depositions, we know that neither of those is Mr. Berman's job, but rather that all such conversations are conducted by Miss Marion Mingle, who is the next witness scheduled.

THE COURT: The fact that it is not his job does not mean that he is not competent to answer the question at all. If he is not, he can say so.

MR. HRUSKA: Your Honor, I would like to put an objection to continued objections, which point out to Mr. Berman what he said in the deposition or point out anything else to Mr. Berman, which is in the nature of a distinction that Mr. Berman might have in mind in answering the question.

We have now had it twice and I believe, your Honor, that it ought to stop.

THE COURT: Well, I don't like to stop objections

unless I believe that they are not made in good faith. I do like to ask counsel not to make technical artifical objections, but I am not concerned about coaching Mr. Berman.

I think Mr. Berman is sufficiently sophisticated a witness that both he understands what is being said, and I am a sufficiently sophisticated judge that between me, him and you, we can get the facts.

What is it, Miss Kearse?

MISS KEARSE: I will object to the form of the question, also, in that it is in terms of "you."

THE COURT: All right. There is a casual use of pronouns in this industry, as I understand it, and they say "I" when they mean the company.

Anyway, let's stop being so lawyerlike and ask Mr. Berman how does this work. Do you know this from first-hand knowledge? I take it you do.

THE WITNESS: Yes. I run the office. I would be derelict if I didn't know how this was handled.

In response to your question -- and this, of course, is Miss Mingle's territory -- a call comes in to the office from a film producer asking for a Shapiro-Bernstein composition. Miss Mingle obtains whatever details a publisher would require.

Then, she will call the publisher. She may not say, "Do I have your authorization to act." She will give him the facts.

Then, if the publisher wants her to act, he will say -- he will give her a quotation.

Q In movie rights, you don't ask the publisher each time you get a request for a quotation from a producer -- you don't ask the publisher each time, "Do I now have authority?" You know, because in the course of dealing with the publisher, that you have authority, isn't that so?

MISS KEARSE: I object to the form.

THE COURT: Overruled.

A We know that we have dealt for him in the past and we assume that he wants us to deal for him in the future.

Q That is all I am inquiring about.

Mr. Berman, I would like to show you a document which has been marked for identification as Plaintiff's Exhibit 581 and ask you if you would identify that, if you could.

A This is a brochure which had been prepared to explain the operation of the Harry Fox Agency.

THE COURT: To whom is it circulated?

THE WITNESS: It is not circulated, your Honor. When we receive a call from an owner of music as to what we do, we merely send it out.

THE COURT: I see.

Q And do you remember when that brochure was first published?

A I don't recall exactly.

I would say it was about 1968, one version. This is perhaps an updated version.

Q This is an updated version?

A Yes.

Q And the information there is current?

A Yes.

MR. HRUSKA: I would offer that in evidence, your Honor.

THE COURT: Any comment?

MR. TOPKIS: If I could read it, your Honor, I don't think I would have any significant objection. But --

THE COURT: I will reserve decision. By lunch time let me know.

MR. TOPKIS: Fine.

Q Let me show you, Mr. Berman, a document marked as Plaintiff's Exhibit 563 for identification. Would you tell us what that is?

A That is an agreement between the Harry Fox Agency and the Japanese society formerly called Jasrac. The arrangement calls for Jasrac to represent Harry Fox publishers when they request it as far as mechanical rights are concerned in the territory of Japan.

Q Do you have agreements like that with other foreign licensing organizations?

A We have recently entered into similar agreements within the past two or three years with the French society, the German society, the Spanish society, and the Swiss society.

Q How about the societies in Greece, Uruguay? Well, let's do them one at a time.

Don't you have agreements like this with the society in Greece?

MR. TOPKIS: I object.

Q (Continuing) The counterpart of ASCAP in Greece?

MR. TOPKIS: I object, your Honor. What difference does it make whether the Harry Fox Agency has a contract with Greece or Baluchistan?

THE COURT: I take it you think that that is irrelevant.

MR. TOPKIS: I do indeed.

THE COURT: I wonder what relevance it has. I am very interested to hear about Mr. Berman's business.

MR. HRUSKA: It is simply to show that the foreign licensing organizations have made arrangements with the Harry Fox Agency to have the Harry Fox Agency handle their music on mechanical rights.

THE COURT: I gather that is the relevance vis-a-vis Harry Fox. But what relevance does that have to

the issue before me?

MR. HRUSKA: It bears on the market functioning, simply to show that --

THE COURT: I don't want to make a fuss about it either. But does it make any difference whether they have eight or ten or twenty or forty foreign agreements?

MR. HRUSKA: Let me see if I can collapse it and approach it this way.

Q Is it true that the Harry Fox Agency has arrangements with all or virtually all of the foreign licensing societies?

A It is not correct.

Q I see.

THE COURT: I didn't hear your answer.

THE WITNESS: It is not correct. We do not have.

Q I see. Could you give me the names or the countries of the foreign licensing organizations which do not have some sort of relationship with the Harry Fox Agency?

MR. TOPKIS: That is in these days. United Nations, that is a tough assignment.

THE COURT: Whether it is tough or not is not the point. All I wonder is whether we need take any time about something like this, which ought to be so clearcut,

whatever it is.

MR. HRUSKA: All right.

THE COURT: Have you gone through the depositions?

MR. HRUSKA: We did not get all this from the depositions. But there may be another way to approach this in shorthand fashion.

Q Are the names of the foreign licensing organizations with which Fox has a relationship, arrangements, in the Harry Fox directory?

A No.

Q Or Harry Fox directory plus supplement?

A No.

Q Where is such a list?

A You must understand that these are basically informal arrangements. ACtually the Harry Fox Agency is empowered to act in the United States primarily, in Canada secondarily, and we only act as an arrangement abroad where publishers who don't have foreign arrangements can coms to. We don't look for foreign arrangements, but there are some unsophisticated publishers who are a little untutored as far as foreign rights are concerned and we merely have this arrangement to take care of them for whatever of their compositions may be used. Basically our foreign rights involvement is very negligible.

Q Aren't the foreign licensing organizations, or some foreign licensing organizations, interested in having the Fox Agency represent them in the United States, that is, to license their music in the United States?

A Yes.

Q And that's really what I'm getting at.

MR. TOPKIS: That's what? I didn't hear that last question.

MR. HRUSKA: I said that is really what I'm getting at.

Q Is it fair to say that you represent most of the significant foreign licensing organizations in the United States, that is, for the licensing of their music in the United States?

A We represent the basic European societies with the exception of the German society.

THE COURT: Are you deliberately using the word, "European"?

THE WITNESS: Yes.

THE COURT: Which leaves out Africa, Asia, South America.

THE WITNESS: Yes.

Q Is it fair to say that the Fox Agency has acquired a great deal of expertise in performing its

licensing functions?

A Yes.

Q How many United States musical publishing companies does the Fox Agency represent?

A We haven't counted recently, but from the last count, in excess of three thousand.

Q Between three thousand and thirty-five hundred?

A Yes.

Q Let me first show you, Mr. Berman, Plaintiff's Exhibit 63 for identification. Could you identify this exhibit?

A This is a list of the music publishers represented by the Harry Fox Agency for mechanical purposes and for electrical transcription purposes. This is not the complete list. There have been various supplements.

Q I think I have one of them, which is PX-64 for identification (handing). Is that in fact a supplement?

A Yes.

By the way, the supplements are cumulative, so there would be only one.

Q I see. Is that the most recent supplement?

A Yes.

Q And have there been publishers added after that supplement?

A Yes.

MR. ERUSKA: I would like to offer PX-63 and PX-64 into evidence.

MR. TOPKIS: Your Honor, I certainly have no objection to the fact, but I really don't understand why clerks of various courtrooms should risk hernias carrying these things around. It is perfectly clear from the witness' testimony --

THE COURT: We will take our chances, Mr. Topkis.

MR. TOPKIS: We will take their chances, is what we are doing. But all right.

MISS KEARSE: No objection.

THE COURT: Received in evidence.

(Exhibits PX-63 and PX-64 for identification received in evidence.)

Q Have any publishers listed in these exhibits told the Fox Agency that they did not want the Fox Agency to get involved in any way in their licensing of movie rights, sync and performance, or television sync rights?

MR. TOPKIS: Could I have that question back, please?

(Question read.)

THE COURT: Do you understand the question, Mr. Berman?

THE WITNESS: Yes, I understand the question.

A I don't think anyone gratuitously offered that opinion. We assume that if we had asked them, of course they would have had the opportunity to tell us. But the answer would have to be no.

Q You send those directories to producers of films and television programs?

A No. Basically it is prepared for distribution to record manufacturers. If anyone asks us for a copy, for whatever purpose, we would supply it.

Q Hadn't there been a pretty wide distribution among producers of theatrical motion pictures and television programs?

A I wouldn't say so, no.

Q Isn't that directory, with its supplement, one of the ways in which you would expect a producer of a television program or of a theatrical motion picture to contact you when they wanted to make a synchronization rights deal?

A No. Basically the Harry Fox Agency has a certain reputation in the industry, and many times we will get calls where we just don't represent a publisher, they have never been listed in any of our directories, and the answer is I don't think they check the catalog before calling.

Q You represent all generalized music publishing companies, don't you?

A I wouldn't say all.

Q No?

A No.

THE COURT: Are there any other agencies who do work like yours?

THE WITNESS: Yes, there are some. There are at least two that I know of.

THE COURT: In New York or where?

THE WITNESS: In New York. They are quite small.

Q It may be a confusion in terms. What do you mean by a so-called generalized music publishing company?

A Did I use that term?

Q Yes, you did, sir.

THE COURT: No, you did, in your question.

MR. HRUSKA: Okay. I'm reading from the deposition.

Q (Continuing) On Page 19 of your deposition you were asked the question on Line 5:

"Q Are there publishers that you do not represent?"

And you said, "Yes."

And the question came:

"Q Can you think of some?"

And you said, "Yes. Charing Cross Music."

You went on to say, "There are many publishers we don't represent because the current" -- "in the current status of the music business you will find that popular groups will organize their own publishing company. And since they are virtually inbred, they write their own music, theyperform their own music, they write for one record company, they don't feel the necessity for outside representation. So Charing Cross is this type of company.

"There are many, but no so-called generalized companies."

A Well, I would assume that I meant by the word "generalized," if there is such a word, companies who basically obtain musical copyrights and exploit them not necessarily by one group but over the broad spectrum of the music business.

Q As distinguished from the inbred music publishing company?

A Yes.

Q Which exists solely for what purpose?

A Solely for the purpose of obtaining royalties for the group, without anyone else participating.

Q ASCAP-BMI distributions?

THE COURT: What is that?

MR. HRUSKA: I said ASCAP or BMI distributions.

A Whatever the purpose, I really don't know as far as ASCAP or BMI are concerned. But when a group who writes their own material and records for a special -- for one record company, they feel they have enough checks and balances so they don't need any outside agent to help them. They receive royalties as artists, they receive royalties as producers, they receive royalties as composers. And if all three balance, they assume they get a fair count.

Q You represent all the major music publishing companies, isn't that so?

A Yes. Virtually all. Offhand I --

Q Can you think of one major that you don't represent?

A Well, if we don't represent them, we really don't consider them major.

THE COURT: Nobody is trying to nail you to the wall.

A (Continuing) Virtually all. That will have to suffice.

Q Can you think of any music publishing company which has been, or which has had representation on the ASCAP board of directors during the last ten years, which the Farry Fox Agency does not now represent?

A Frankly I don't know the representation on the ASCAP board, so I couldn't answer the question.

Q Would you estimate that you represent seventy per cent of all the music publishing companies in the United States?

A Yes.

Q And that basically the ones that you don't represent are these so-called inbred companies, performer, writer-owned companies?

A Yes.

Q Are there any other organizations that serve a clearing house function with respect to mechanicals or movie rights or television sync rights?

A There are at least two of which I'm aware who operate basically in the same fashion as we do. That is the Copyright Research Bureau and the American Mechanical Rights Agency.

Q Could you tell me a little more about those?

A Well, the American Mechanical Rights Agency was organized, I would say, some ten or twelve years ago. Specifically they originated by representing German publishers for mechanical rights, and subsequently they had other publishers who approached them.

Q American publishers?

A American publishers, yes. I don't know the extent of their representation. It is fairly minimal.

Q And what about the Copyright Service Bureau?

A The Copyright Service Bureau, again, originally was started to represent the Beatles publishing companies. That was the start. From that point on they obtained other companies to represent. Subsequently they lost the Beatles, but they are still in existence. They have some very substantial representation.

Q The Beatles came to you?

A Yes.

Q What is the name of that publishing company?

A Maclen Music.

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Q You have some dealings at the Fox Agency with Mr. Bernard Brody, do you?

A Yes.

Q And Mr. Brody represents producers of television programs, does he?

A Yes.

Q And when he calls your agency, he is interested in obtaining synchronization rights for music to be used on those programs?

A Yes.

Q If you represent the publisher of the music which Mr. Brody's client wants to use, Mr. Brody will go to your agency, right?

A Yes.

Q What about Mary Williams? Does she operate the same way that Brody does?

A Yes.

THE COURT: Is she on the Coast also?

THE WITNESS: Yes.

Q Is that the Mary Williams Agency? Do you know the full name of her agency?

A I think it is called Mary Williams Clearing Agency. I am not sure.

Q But it is basically Mary Williams herself; she

is a live person.

A Yes.

Q Is there anybody else in that business that serves this function that Brody and William serve?

A Not to my knowledge.

Q All right. I would like to inquire a little bit, Mr. Berman, about your files, the files of the Harry Fox Agency.

THE COURT: I think this would be a good time for us to take a short morning recess and get your files in order in the meantime.

(Recess.)

BY MR. HRUSKA:

Q Mr. Berman, does the Fox Agency maintain files setting forth the titles of the musical compositions in the catalogs of the publishers represented by Fox?

A To some extent, yes, not one hundred per cent of all titles.

Q Right. You think you got a pretty good --

A Well, the title of that would most likely be used, and we maintain the file.

Q How is that file maintained? Is it alphabetical by title?

A We now have two files. Originally it was

alphabetically by title, maintained on 3 x 5 cards.

Q Index cards?

A Index cards. In October of last year we went on a computer system and now we have computer runs alphabetically by title.

THE COURT: One covers the same material as the other, is that the point?

THE WITNESS: Yes.

Q Up until October, 1972, this file of titles was maintained exclusively on index cards?

A Yes.

Q No computer maintenance of that file?

A No.

THE COURT: Like the public library, that sort of thing?

THE WITNESS: Yes.

Q Each one of those index cards has the title of the composition plus what else?

A The title, the names of the writers, the name of the publisher, and from time to time whatever other extraneou information we may pick up: copyright date, foreign ownership, et cetera. But basically it is just the name of the title, writers and publishers.

Q Sometimes there is a co-publishing arrangement

with respect to a particular copyright, isn't there?

A Yes.

Q And would the names of both publishers appear on that card in such a circumstance?

A Yes.

Q And would you also have on the card the shares owned by each publisher in the copyright?

A Yes.

Q Do you also have files on each publisher?

A No. Well, when you say "files on each publisher," I don't know what you mean by that question. We have files in which we maintain occasional correspondence from publishers, but we have no files that indicate the compositions owned by each publisher.

Q In other words, you don't have the publishers' catalogs except to the extent they appear on the index cards maintained by title.

A Yes.

Q Now, on publishers, however, you do have files which contain license forms that publishers have used in the past?

MR. TOPKIS: Couldn't the question be put in non-leading fashion, your Honor?

THE COURT: Yes. I think that is a fair request.

MR. HRUSKA: Okay.

Q What, in addition to correspondence between the Fox Agency and the publisher, do you maintain the files which are organized by publisher name?

A We maintain copies of current licenses issued to phonograph record companies embodying their works.

Q Phonograph record companies?

A Yes.

Q By the publisher whose name appears in the legend in the file?

A Yes. Again, that was up to October of 1972. We now have computer runs of the contents of these licenses, so we no longer maintain the licenses by publisher; we now maintain the licenses in numerical order.

We have a license number assigned to each license, and from October, '72, they are maintained by numerical order, although we have the computer capacity to obtain runs indicating which licenses have been issued for which publisher.

Q I see. So let's suppose you get a request by a user of music for a license pertaining to a song owned by Shapiro-Bernstein. How would you retrieve that out of the computer, do you know?

MR. TOPKIS: Retrieve what out?

MR. HRUSKA: Whatever information he would want to know, such as the fact that it is a Shapiro-Bernstein song and, too, the form of license that Shapiro-Bernstein has recently used in a similar transaction and presumably would want to use in this transaction.

MR.TOPKIS: And is the question how would you get that out of the computer?

MR. HRUSKA: Yes, if Mr. Berman knows.

MR. TOPKIS: And if it is in the computer.

THE COURT: You actually can't get it out unless it is in.

MR. HRUSKA: Quite so.

THE COURT: I gather that the name of the song and the publisher is there and that you have some information also as to terms of licenses.

THE WITNESS: I should make it very clear that the computer is only used for phonograph record licensing. We only maintain our records with the publishers and the record manufacturers on a computer. All of the negotiations or licensing arrangements with the publishers are not on the computer, and that is maintained either by publisher file or by producer file.

Q Well, do you know what a Ramac disc system is?

A No.

Q Do you happen to know whether the information that you have put into computerized form is stored on reels of magnetic tape or stored on discs?

A I believe it is stored on discs.

Q And do you know whether that is a random access system?

A No, I don't.

Q You mentioned producer files. What kinds of files do you maintain with respect to producers?

THE COURT: We are talking now about ordinary files, not computers, right?

MR. HRUSKA: Yes, your Honor.

Q Mr. Berman, did you say that files with respect to producers are not in computerized form now?

A Yes.

Q So we are talking about ordinary files containing paper information. What kind of files concerning producers do you maintain?

A Frankly, I'm not the file expert in the office and I would find it difficult to explain to you except in a very generalized way --

Q That's all we are looking for.

A Again, if you want to divide it into two parts, if you want to go into motion pictures, if Paramount Pictures

is going to produce a motionpicture, Miss Mingle will probably maintain the file by the name of the producer and the name of the motion picture, and I assume she would have access to whatever current operation there is.

Q And this would show what a motion picture producer had made in the past for various --

THE COURT: Again, why don't you ask him what it would show.

MR. HRUSKA: Okay.

Q What would it show, Mr. Berman?

A It would indicate a quotation given by the publisher to the producer for the use of the song in the motion picture. It would further show, if the quotation were actually utilized and the song was actually used in the motion picture, the licensing agreement executed between the publisher and the motion picture producer.

THE COURT: Those license agreements are written, are they?

THE WITNESS: Yes.

THE COURT:

And the price would be set forth in that agreement?

THE WITNESS: Yes.

THE COURT: Who prepares the form of license agreements? Doesthe publisher?

THE WITNESS: Well, we have various forms which are approved by various publishers. So there a number of different forms for motion picture licensing, and we are aware which publishers require which forms.

THE COURT: Just as a matter of curiosity, in the development of these forms are you generally the originator of any amendments or changes or are the publishers or --

THE WITNESS: No. Generally it would be the publisher who would come out with certain innovations to the form.

Q I would like to get into those forms. But just one quick question before I do.

The files that you maintain setting forth the titles of compositions and the other pertinent information that you discussed a few moments ago, those are files, are they, which are used by all the licensing operations of the Fox Agency? In other words, used for mechanical transactions, TV sync, movie transactions and electrical transcriptions?

A If you are talking about the file of titles, the answer is yes.

Q Not so for publisher files?

A Well, publisher files are not current files. They are just repositories for correspondence.

Q I understand, but are they broken down by type of license? In other words, a separate publisher file -- let me be more specific -- a Shapiro-Bernstein file for mechanicals and another Shapiro-Bernstein file for TV sync rights and so forth, or is it one Shapiro-Bernstein file?

A No. It would be separate.

Q By licensing function?

A Yes.

Q Let me show you PX 550 for identification and ask you if you could identify it.

A Yes. This is a licensing form used to license compositions to television users on behalf of the publisher.

Q Synchronization rights?

A Yes.

Q And this is a Harry Fox form?

A This is a Harry Fox form.

MR. HRUSKA: I offer PX 550 into evidence.

MR. TOPKIS: No objection.

MISS KEARSE: No objection.

(Exhibit PX550 received in evidence.)

Q I would like to show you, Mr. Berman, PX 552

for identification and ask you if you can identify that.

A This is one of the synchronization licenses used by the Harry Fox Agency for theatric motion pictures.

Q Do you happen to know which publishing company uses that form?

A No, I don't.

Q Could you look at it and tell me whether you would associate this form with Chapel Music?

A I really don't know.

Q In producing these forms to us during the course of your deposition, although I was not at the deposition my understanding is that you or somebody from your organization wrote the name of the publisher in pencil at the top of the form.

I believe the original, which was handed up to his Honor, has the --

THE COURT: Let's put it this way:

It's written on here and you can look and see if that refreshes your recollection whether it refers to Chapel or not.

MR. TOPKIS: There seems to be no question about it. It is the Chapel form.

THE COURT: Stipulated, or not contested?

MISS KEARSE: I have no way of contesting it.

MR. HRUSKA: I offer it in evidence.

MR. TOPKIS: NO objection.

MISS KEARSE: NO objection.

(Exhibit PX 552 received in evidence.)

MR. HRUSKA: I have several more of these. Would it be all right for me to offer them in a batch so we don't have to hold up on each one?

THE COURT: It would be fine. Just be sure your opponents know what it is.

MR. HRUSKA: PX 553 is identified as the Famous Music form.

PX 554 is identified as the form used by MCA, the Edwin H. Morris Company and Elkan-Vogel.

PX 555 is identified as the form used by Robbins Music.

Q Incidentally, may I ask you, is Robbins part of the Robbins-Feist-Miller group, which is known as the Big Three?

A Yes.

MR. HRUSKA: PX 556 is the form used by Shapiro-Bernstein.

PX 557 is the form used by Warner Bros.

PX 558 is the form used by Schirmer.

PX 559 is the old mechanical rights license. For get that. That's it.

Q Could you take a look at those, Mr. Berman, and either corroborate my description of them or tell me that it's wrong?

A I'll corroborate your description.

THE COURT: Have you looked at them all?

THE WITNESS: Yes.

THE COURT: Is Mr. Hruska's description correct?

THE WITNESS: Yes, it is.

MR. HRUSKA: I offer those exhibits into evidence.

MR. TOPKIS: No objection, your Honor.

MISS KEARSE: No objection.

THE COURT: They are received.

xxx (Exhibits PX 553, 554, 555, 556, 557 and 558 received in evidence.)

Q Getting back to those index cards with the titles of the song and the names of the writers and the publishers, et cetera, on them, which have been fed into the computer --

MR. TOPKIS: What?

MR. HRUSKA: Which have been fed into a computer.

MR. TOPKIS: I didn't know that that had been done

MR. HURSKA: I thought that we had established that. Let me go back over it.

THE COURT: I don't know whether you people are differing on a technicality or something of substance.

I understand that substantially the material that was on index cards with regard to titles and so on has been computerized, whether it was the cards fed into a computer or how.

Is that correct, Mr. Berman?

THE WITNESS: Basically, it is correct.

Q The information on the cards was punched onto a tabulating card, right?

A Not one hundred per cent. We tabulated the meaningful songs, the songs that were used.

Q Do you have any idea of the percentage of the song titles on those cards hich were not put into computerized form?

A I would say the vast majority was not put into computerized form.

Q Do you know how many titles appear in that index card file?

A I would say in excess of 300,000.

Q With respect to the index card file, who has supplied the Harry Fox Agency with the information which has been put on those cards?

A Basically, it comes from the music publisher.

Q And publishers keep that information current?

A Yes.

Q So, if there are changes in -- shifts in catalogs from one publisher to another, the publishers will notify you?

A The publishers who acquire the song will notify us.

Q And any other changes of material information regarding those titles, the publishers would notify you of that?

A Yes.

THE COURT: When we say that the publishers keep the situation current, basically, you mean they give you the necessary information so you can keep your card index current, is that right?

THE WITNESS: Yes, that's right, sir.

Q And publishers have an incentive to do that, do they?

MR. TOPKIS: Oh, I object, your Honor.

THE COURT: Just, do they do that? In your opinion, do they have --

Well, sustained. It seems to me that's a matter of argument, Mr. Hruska.

MR. HRUSKA: Mr. Berman does have an opinion on the subject, your Honor, and I think the opinion is material.

THE COURT: Well, I have a very high regard for his expertise but it seems to me that like many of the facts in this case, our general experience is sufficient for us to determine whether a man has an incentive or not.

If he is trying to sell something and there is one man to whom you generally sell it, it seems it would be wise to keep him advised.

Q Does Fox keep on file any general pricing instructions given to Fox by publishers?

A No.

Q None at all?

A Well, we don't get any pricing instructions. The only basic pricing instruction we get is derived from the copyright act which indicates a statutory rate for the use of music on records.

Beyond that, there is no --

THE COURT: May I ask you this -- I've heard several witnesses now who have indicated that, in general, the sync rights for television production range from $50 to $150 with some exceptions, the most notable of them apparently being "Happy Birthday," which is $600 or whatever.

THE WITNESS: Yes.

THE COURT: Now, that seems to be such a general

understanding on their part -- do they ask you every time, do you ask the publisher every time what the sync rights are or how do you know?

THE WITNESS: If we are talking about television, we generally know the position of most publishers, but it's not as a result of any specific instructions.

There are some major publishers who have adopted a very loose attitude toward the use of their music in television. They want the music used; they keep the price down and we know it.

If there is any publisher -- if any song comes up that is owned by a publisher who has not indicated what he wants for the composition, then, of course, we contact him.

THE COURT: Do you carry this information or your staff in their heads basically?

THE WITNESS: Yes, your Honor.

Q Well, some publishers do tell you in advance -- that is, before you call them for a specific quote in response to a specific request made by a television producer or Mr. Brody or Miss Williams -- some publishers do tell you in advance of the price that they are willing to license the sync rights to their composition under certain circumstances?

MISS KEARSE: Objection to the form.

Your Honor, could we have it without all the leading questions, please?

THE COURT: I think that all Mr. Hruska is now trying to do is to be sure that he understands the answer last given.

MR. HRUSKA: Exactly.

A It's a very loose arrangement. I don't know how it originated as to the understanding that is received from the publishers for the use of their music but, basically, the information is just known to the person who clears the music in the office.

I would say that if a publisher had some opposition to a price, he would be much more inclined to advise us. A deviation from the norm, his norm, rahter than advising us of his --

THE COURT: Let me ask you this, Mr. Berman.

Is a written document signed every time a song is licensed for TV use? Sync rights?

THE WITNESS: Yes, your Honor.

THE COURT: Then the publisher will know what the price is going to be before he signs it, won't he?

THE WITNESS: We sign it in his behalf.

THE COURT: Then he won't, but, now, let me ask

you other questions.

Suppose as a result of inflation, which may or may not have been a factor in your business, it becomes a fairly widespread desire to raise prices. How will that occur, or how has it occurred?

THE WITNESS: A publisher will call us and tell us that from now on he wants his songs quoted at a certain price, with possibly some exceptions.

THE COURT: And you simply are able to somehow or other confer with your staff, work it out?

THE WITNESS: Yes, your Honor.

Q You said something before, Mr. Berman, that a member of your staff would know -- you mean a member of your staff would know with respect to a particular publisher what that publisher's sync rights fee is?

A Generally, yes.

Q I take it we are talking about Mr. Finell?

A Well, Mr. Finell or myself.

Q What is Mr. Finell's full name?

A Alan Finell.

Q And he deals in TV sync rights?

A Yes, he does.

Q For the Fox Agency?

A Yes.

Q Now, Mr. Finell or yourself would know with respect to many of the publishers that you represent that their price for TV sync rights is "X" dollars?

A Yes.

Q And you know that because the publishers at some point in time have told you that?

A Yes.

Q And you don't have to check with them on each transaction?

A No.

Q You do not have to check?

A Not in television, no.

THE COURT: Can I ask one question here?

Is it generally the practice or usually the practice or what, that one publisher will have a uniform price for sync rights for all songs in his repertory or do they vary, among one publisher's songs?

THE WITNESS: They will be ninety-nine per cent in one price. They have certain songs which may vary.

THE COURT: If there is that small exception, you know what it is?

THE WITNESS: Yes, you know what the exception is.

Q Are there any publishers represented by the Fox

Agency who have given you such price instructions which have told you that you can license television sync rights for less than $50?

A Generally, no. There is a, one variation, and that is a network repeat.

When a program on film or on videotape is shown on the network the first time, no fee is paid. When it is repeated on the network, generally, a fee of $25 per network repeat is charged.

This is just a price that arose some years ago and everyone has accepted it with small variation.

Q That price of $25, that used to be the minimum price in television sync rights some years back, wasn't it?

A Basically, yes. There have been some lower prices for specialized types of shows but basically, $25.

Q Do you remember when that change occurred from $25 to $50?

A That is not a change. The $25 still is a basic price that is accepted by most publishers for the one time network repeat in the United States.

Now, the moment you go beyond a one-time network repeat, then it gets into a different category, mostly the syndication category and then you have a different price structure.

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Q These price instructions from publishers, are some of them in writing in the publisher's files and do you have papers in your publisher files that contain these things?

MR. TOPKIS: I thought we had been all over this.

MR. HRUSKA: Let me restate the question. It wasn't stated well.

Q Do you have,in your publisher files, any writings which set forth thepublisher's pricing instructions with respect to television sync rights?

A I would estimate that we do not. We have an occasional letter from a publisher saying that for this particular song do not license it without my specific instructions, but this is just a guess on my part.

The answer basically, is no, we do not have pricing instructions.

Q You and Mr. Finell just have in your mind the pricing instructions of the major publishers that you represent?

A Yes.

THE COURT: I think you have established that. Can you go on?

MR. HRUSKA: There is another point that we haven't established.

THE COURT: Maybe you haven't established another point but you have established that point.

I don't mean to be sharp but it just seems to me that we are treading water.

Q How do you know the price above $50 that the publisher wants to charge? If a publisher wants to charge more than $50, how would you know that? Do you carry that around in your mind, too?

A Yes. Basically, there is one group of publishers who require a $50 fee. Another group of publishers, generally, want $150. Some want 250 and, then, we have various -- in not every case do we know or carry around in our heads the requirements of the publishers.

Every once in a while we will have some esoteric request but, basically, we know.

THE COURT: Could you tell me just, again, a matter of curiosity, how many inquiries you get on an average day?

THE WITNESS: We don't get that many inquiries. It varies, depending upon the utilization of musical shows on television.

Right now, we are in a very doldrum period. There are not many musical shows on television. So, I would say that we may not get -- I haven't heard from the Coast in weeks.

THE COURT: Is it a season sort of thing, when they are preparing the shows?

THE WITNESS: Yes. They apparently are not preparing any musical shows for the forthcoming season, so we don't get many, your Honor.

MR. HRUSKA: I will be exploring this whole subject, your Honor, a little later in the examination.

Just one more point here.

THE COURT: All right.

Q Are you aware of any arrangements between the American Guild of Authors and Composers, known as AGAC, and music publishing companies which has had some effect on the fee charged for synchronization rights licenses?

MR. TOPKIS: I think I will object to that question.

THE COURT: I think the effect part of it asks him for a conclusion. You can ask him if he knows any agreement with regard to that subject.

Q Do you know any agreement or any arrangement between AGAC and any music publishers with respect to the subject of synchronization rights fees?

A No.

Q Are you aware of any discussions between anybody at AGAK, a representative of AGAK on the one hand and any

music publishing company or representative, on the other hand, with respect to synchronization rights fees?

A No.

THE COURT: Have you ever been present at any such discussions?

THE WITNESS: No.

Q Have any of your publishers ever told you of such discussions?

A Not that I can recall.

Q We have kind of wandered off the main stream in the examination.

I would like to come back and ask you if you can give me a thumbnail sketch of the history of the Fox organization. Start with when did it start and how it developed.

You did this in about one paragraph in the deposition. I don't want anything lengthy.

MR. TOPKIS: I won't object to counsel's reading that paragraph to the witness and asking him if it's accurate.

THE COURT: Is that satisfactory?

MR. HRUSKA: Well, I would prefer it that way.

THE COURT: Go ahead, Mr. Berman.

A Basically, the Harry Fox Agency started some time in the 1930's, when Harry Fox began to represent music

publishers in connection with their mechanical rights. The business grewand more and more publishers joined the Harry Fox Agency.

Basically, it's as I indicated before -- Harry Fox Agency represents publishers for their phonograph and tape rights and, generally, for their transcription and other rights.

Q Mr. Fox himself was originally an employee of the NMPA?

A Yes. It wasn't called NMPA at the time.

Q It was called what?

A I think it was called MPPA -- Music Publishers Protective Association.

Q Are you sure that it was mechanicals, mechanicals was the first area that the Fox Agency got into?

A Well, of course, I wasn't around at the time.

Q I know.

A It may have been electrical transcriptions. In the early days, this was the big, the income-producer.

Q Could you describe what electrical transcriptions meant back in 1930?

A Yes. The electrical transcriptions were produced on 16-inch discs, which were bicycled around the various radio stations to provide programming, in the same manner

as tape is produced today, and at that particular time, a specialty structure arose, quite a complicated one.

It called for a fee of 25 cents per composition per use for a radio station and it was 50 cents for the use of a composition from a musical comedy, and a great many shows on radio, the early days of radio, were the syndicated shows on these so-called electrical transcriptions.

This was a negotiated kind of fee structure because the producers of these 16-inch discs recognized that it wasn't fair to pay two cents, which was all the law required, for the reproduction, when they actually would take the disc and send it to perhaps 400 radio stations, so, I don't know the details, but a negotiation came about whereby they agreed to this per use basis.

Q The Fox Agency got into the licensing of mechanical rights because there was a need for a clearing house operation in mechanical rights?

A I assume so, yes.

Q Do you recall when the Fox Agency got into the licensing of performance rights to producers of theatrical motion pictures?

A There was a legal decision -- I think it was called the Leibell decision.

Q Alden Rochelle?

A Yes.

Q Judge Leibell?

A Yes. And that decision apparently precluded ASCAP from licensing theatres. As I understand it, the right existed but, for some reason, ASCAP could not enforce that right.

Q When ASCAP got out, the Fox Agency came in?

A Apparently. The publishers asked us to at the same time we licensed the synchronizing rights, they asked us to include a performing rights fee.

Q Again, because there was a need for a clearing house operation?

MR. TOPKIS: I think, your Honor, this is going too far.

THE COURT: Sustained.

MR. HRUSKA: It's right out of the deposition.

THE COURT: Either ask the questions or read the deposition.

MR. HRUSKA: Well, your Honor, we would have read the deposition except for the objection.

THE COURT: Mr. Hruska, we are not asking for anything unusual. We are just asking you to question a witness the way he should be questioned.

Q Why did the Harry Fox Agency begin to act as a

clearing house operation with respect to the licensing of performance rights to producers of theatrical motion pictures?

MR. TOPKIS: I object to that question on two grounds:

One, the term clearing house operation is rather ambiguous and, two, unless this witness is demonstrated to have participated in the decision to do whatever the Harry Fox Agency did, I don't think he is competent to answer the question.

THE COURT: Do you mean that if we can't find anybody alive at the time I can't hear anybody on the subject?

MR. TOPKIS: Well, I don't think there is probably very much doubt about why it happened, your Honor, but --

THE COURT: Then why delay the answer? You know, I am aware of all the weaknesses of testimony by somebody who wasn't there, and so forth. You don't have to point it out from hereon.

I think we are all interrupting each other more than is necessary.

Mr. Berman, give me whatever answer you can.

THE WITNESS: We cleared the rights because we were asked by the publishers to do so.

Q Do you know whether music publishers had any other organization set up that was able to perform that function?

A To my knowledge, no.

Q Does the term clearing house operation mean anything to you, Mr. Berman?

A Yes.

Q Is that what the Harry Fox Agency does?

A No. We represent music publishers.

Q When did the Harry Fox Agency begin representing music publishers in the licensing of television sync rights?

A Basically, when television began.

Q Why did the Harry Fox Agency commence representing music publishers in the licensing of television rights?

A Because they asked us to.

Q Was there any other organization set up at that time to represent music publishers, the way that Fox ultimately did, in the licensing of synchronization rights for television?

A No.

Q Who in the Fox Agency handles the licensing of mechanical rights?

A The major part of our staff, we have -- If you want particular names --

Q Who are the principal people?

A Well, there is a Miss Ann Brown. Mr. Herbert Shapiro.

Q Herbert Shapiro?

A Yes. They are in the licensing.

Then, we have a Howard Balsam, who is in the financial end of the licensing.

Q I just want to stay with the licensing.

Mr. Shapiro and Miss Brown, is it?

A Miss Brown, yes.

Q Are they the only people who do the licensing, as opposed to supportive functions, like clerical, filing, comptroller functions?

MR. TOPKIS: If your Honor please, with respect to your comment on interruptions, I submit that this is totally irrelevant. We are just wasting time.

THE COURT: Would you make an offer of proof as to this, Mr. Hruska?

MR. HRUSKA: Yes, your Honor. It is our purpose with this particular line of examination to show that all the licensing transactions handled by the Fox Agency in mechanical rights are done by two people.

THE COURT: Can't you just ask him how many people do it?

Q How many people do it?

A Much more than -- many more than two people.

MR. HRUSKA: You see, that's the problem. I don't believe it is many more than two people, your Honor, and I believe we are entitled to inquire into it.

THE COURT: Go ahead and ask your questions.

Well, let's just approach it differently.

Who are the people to whom you are referring when you say there are more than two people and what does each person do?

THE WITNESS: Well, basically, Miss Brown and Mr. Shapiro are in charge of the licensing for phonograph records. They have, offhand, I don't know how many -- there must be at least ten other people, who are involved in the operation.

Q How involved?

A Well, it's a physical process. As far as phonograph records are concerned, we issue in excess of 60,000 licenses a year. We have the computer people who are under the supervision of Miss Brown and Mr. Shapiro.

Q Who gets on the telephone with the publisher, on the one hand, the phonograph record company, on the other hand, and puts a deal together?

MR. TOPKIS: The first question, I should think, is "Is that how it's done."

A Basically, there is a statutory rate, as far as phonograph records are concerned. The great majority of phonograph licensing is done, a substantial amount of the licensing, is done at the statutory rate.

So, if we have the information as to the ownership of the composition in the file, there is no telephone communication necessary.

If we receive a request for a reduced rate, where a publisher has to approve the rate, then Miss Brown's staff will send out mail inquiries. If there is an urgency about the license, yes, Miss Brown will get on the phone, Mr. Shapiro will get on the phone and perhaps one other or two, I don't know, but --

Q Participate in the negotiations?

A It is not a question of really negotiating. It is to ask the publisher will he take a one or one-half cent rate, and he either says yes or no and that's it. It is really not a negotiation.

Q Well, you report that back to the phonograph company which had asked for a rate lower than two cents?

A Generally we try to handle a lot of this by mail.

Q I understand. But in terms of the human beings at the Fox Agency who would participate in that type of telephone conversation, is there anybody other than Mr. Shapiro or Miss Brown who does that?

A Occasionally there might be, yes.

THE COURT: Would it be fair to wrap all this up by saying that except for the occasional instance Miss Brown and Mr. Shapiro are their contact men on this subject with your clients or your publishers but that they have a staff of six or eight other people to do the supportive work for this function?

THE WITNESS: Yes.

Q You said that Fox handles more than sixty thousand mechanical rights transactions a year. What percentage of those transactions are made at fees below two cents a record?

A I don't know.

Q Could you give me an approximate figure?

A No, I couldn't. I really don't know.

Q At your deposition, on page 42 --

THE COURT: You are not cross examining. If you want to show him that and ask him if it refreshes his recollection or read it to him --

MR. BRUSKA: I am just about to do that, your Honor.

Q (Continuing) -- you said, "The vast majority of licenses are issued at the two cent rate. Twenty per cent are not."

Does that refresh your recollection?

A Basically -- I may have been a little more daring at the time -- twenty per cent might be right.

Q Perhaps I can remind you, Mr. Berman, that prior to the deposition an arrangement was made in which you would try to estimate or arrive at approximations of certain figures immediately before arriving. Do you recall whether you consulted with anybody or attempted any estimate prior to your deposition which would have permitted you at the time of this deposition to have made that estimate?

A I don't recall any such arrangement.

Q That stops me cold.

THE COURT: Well, are you now saying that it is substantially different than twenty per cent?

THE WITNESS: No, your Honor. It is just that the figure of twenty per cent is realtively meaningful. It really depends on the nature of the licensing we are doing. At the present time there is a very large demand for reduced rate licenses because we have a lot of records that are being advertised over the air where they are using an [illegible]dinate amount of compositions on a recording, and they require lower rates.

So, on a broad spectrum, the twenty to twenty five per cent is reasonably accurate.

THE COURT: Thank you.

BY MR. HRUSKA:

Q What is the total annual dollar volume of the mechanical rights transactions handled by the Fox Agency?

A I would approximate $15 million a year.

Q That would be the total of all the fees paid by the phonograph record companies in the course of a year for mechanical rights.

A Yes.

THE COURT: Those two cents add up, don't they?

THE WITNESS: They certainly do.

Q For how many phonograph record companies does the

Harry Fox Agency issue mechanical rights licenses in the course of a year?

A I would just have to give you an estimate. Several thousand.

Q And for about how many music publishing companies does the Fox Agency handle mechanical rights licenses during the course of a year?

A Well, we represent in excess of three thousand, so it could be up to that amount.

THE COURT: In other words, you might do something for every one of them during the year.

THE WITNESS: Conceivably.

Q We are really talking about a range of two to three thousand?

A Two to three thousand a year.

Q You said something before about special fees in mechanicals becoming more common. Could you give me examples of the kinds of uses for which special fees is less than the two cent fee that might be quoted by publishers?

A For a long time a publisher looked to receive 24 cents over all from each long playing record. Generally they say it would include twelve compositions on a recording. Now is the period of trying to cram as much music

as possible on a recording, so we will have, instead of the normal twelve, perhaps twenty, and in order to enable a record manufacturer to include twenty compositions on a recording, publishers will voluntarily reduce their fee so that they can come within the 24 cents guideline.

THE COURT: Where does the impetus for this condensed music come from? Is that from the recording companies?

THE WITNESS: Oh, yes. They try to give the public as much as possible for their dollar, and they look to the music publisher to contribute.

Q Would that be a specialty product?

A Yes.

Q Could you give us examples of any other special products for which the fee would be less than two cents?

A Oh, for record clubs generally the fee is less than two cents.

Q Less than two cents a song?

A Yes.

Q Per record sold.

A Per record sold.

THE COURT: Does your agency handle classical music as well as popular?

THE WITNESS: Yes, we do, for that amount that

is not in the public domain. There is a reduction generally for socalled budget records. When records are sold below a certain price, the music publishers are asked to contribute by accepting less so that the record can be sold for less.

Q Is there such a thing as broadcast records?

A Those were the records I spoke about before, where records are prepared for television advertising. Again, if they sell you a single record for $3.09, they will try to give you perhaps 25 songs on an LP. And if they don't, they'll offer you perhaps four records for $7, utilizing sixty songs. So that is the socalled broadcast package.

Q And with respect to those, the music used on those records, the publishers would sometimes authorize fees of below two cents a song.

A Yes.

Q What about premium records, give-aways by --

A Yes. If a record basically does not reach the buying public but is given away free of extra charge, the publishers generally will accept a lesser fee.

Q How low can these fees get below two cents for this kind of specialty product?

A It would depend, of course, on the volume of

recording. Basically publishers are reluctant to go below a one cent rate. But if a record manufacturer could guarantee to a music publisher that if he accepts a one-half cent rate he will guarantee a million records sale, the publisher could go down to a lesser fee.

THE COURT: You mean a formal guarantee?

THE WITNESS: Yes, a formal guarantee.

THE COURT: That would make it what, fifty thousand or five, on a million records?

THE WITNESS: There would be a five thousand dollar fee.

Q Who does Fox bill for the commission? The phonograph record company or the publisher?

THE COURT: You mean for its commission?

MR. HRUSKA: Yes.

A The music publisher.

Q The music publisher.

A Yes.

Q What commission does the Fox Agency charge the music publishers with respect to mechanical rights transactions?

A We have a two phase charge. For publishers whose gross is in excess of $25,000 per year the authorized charge is three and a half per cent, at our option, which has at

our option been reduced to three and a quarter per cent.

THE COURT: That is over 25,000?

THE WITNESS: That is over 25,000 per year.

Q When did you make that reduction?

A As I recall, it was in July of 197.

Q What about for publishers under?

A For publishers under 25,000 a year the charge is five per cent, and here again we voluntarily reduce it to four and a half per cent.

Q So consistently from July 1971, if that is the date, the fees have been four and a half and three and a quarter?

A Yes.

Q Why did Fox make that reduction?

A Basically we are not a profit making organization, and at the time our costs were less than our income, and this seemed the most effective way of reducing the income, by charging less.

THE COURT: You basically consider yourself a service agency for the publishers, is that it?

THE WITNESS: Yes, we do.

Q Does the Harry Fox Agency do anything to insure itself that phonograph record companies are not putting out phonograph records which contain musical compositions to

which those companies have not obtained a mechanical rights license?

A Yes. That's one of our most important functions. We maintain an audit program which covers basically all the meaningful companies in the industry --

Q Phonograph record companies.

A Phonograph record companies -- to verify that the accountings are correct and that they obtain licenses for those copyrights controlled by our principals.

THE COURT: You mean in the financial sense of the word.

THE WITNESS: Yes.

THE COURT: Not in the hearing sense of the word.

THE WITNESS: No.

THE COURT: How on earth do you find out how many times they play a record?

THE WITNESS: No, this is not what we look for. They are required under the license to pay us two cents for every record they sell.

THE COURT: So you just have to count the number of records they produced.

BY MR. HRUSKA:

Q You said something about all the meaningful

phonograph record companies were in this group that you surveyed. How many phonograph record companies does that amount to?

MR. TOPKIS: Objection, your Honor. I don't know what phonograph companies have to do with this case.

THE COURT: I think Mr. Hruska is trying to bring out the details of this system as part of a possible paradigm for a system within the TV industry, and I'll hear it.

A It would be several hundred per year, and it could vary. If the range of successful record companies broadened in any one year, of course we would increase it to cover those companies. We really look at it as a financial situation. If we have received enough royalties from a company to warrant an examination of their accounts, or if we have not received enough royalties and yet the publicity would appear that we should have, we would go in to audit them.

Q Do you have any general procedures to determine whether or not phonograph records are being issued without mechanical rights licenses, in other words to police infringements?

A Yes. We have several people on our staff who check all release schedules available, all printed material

referring to the industry that is available, and we try to maintain a policing action on releases.

Q To what category of users of music does Fox issue electrical transcription licenses?

A Basically we issue these licenses to producers of background music, the Muzak type of operation.

Q I see. Muzak; Seeberg, is that another one?

A Muzak, Seeberg, Rowe, and there are some independent type operations.

Q Do you know on what basis Muzak pays the fee?

A Yes. The basic Muzak fee is $5 per year or $12.50 for a three year period. That is the same fee that Seeberg and Rowe pay.

THE COURT: In other words, it is terminable license, is that it? It is the right to use the transcription for that period of time?

THE WITNESS: For that period of time, yes.

Q That would be per song?

A Per song.

Q Irrespective of the number of installations serviced by the Muzak system?

A Yes.

THE COURT: That's per song, not per disk?

THE WITNESS: Per song.

Q Do you know the total amount that Muzak paid last year as an electrical transcription fee?

A I would just have to guess. Basically Mazak will license on a three year basis, what they call their basic library, and I think that for the period from 1972, three years from 1972, they paid about $37,000.

Q For the three years.

A For the three year period. And as they add new material, they make periodic payments. It can't be very much.

THE COURT: So that means, in effect, that they license three thousand songs at 12.50?

THE WITNESS: Yes, that's about it.

Now, my estimate would be that the total paid by Muzak would really not exceed twelve, fifteen thousand per year.

Q Just to make sure that there is no confusion, Mr. Berman, have you and I ever met before?

A No.

Q Have you ever met with anybody in my office other than at your deposition?

A No.

Q Did you meet with anybody at my office prior to your deposition?

A No.

Q Have you ever met with Mr. Topkis before?

A No.

Q Did you meet with Mr. Topkis prior to the deposition?

A No.

Q Anybody from the Paul Weiss office?

A Yes.

Q With whom?

A I met with Mr. Sussman.

MR. BLUMSTEIN: Blumstein.

Q You met with Alan Blumstein, that handsome gentleman sitting over there?

A Yes. I'm sorry.

Q Did you meet with anybody from the Paul Weiss office prior to appearing here today?

A I just want to be exact. Yes, I met with someone, but not relative to this case.

Q Relative to another case.

A Yes.

Q The Oklahoma case.

A No.

THE COURT: It may be his own affairs.

To make it short, have you been brainwashed by

either side, Mr. Berman?

THE WITNESS: No, I have not.

MR. HRUSKA: Thank you, your Honor.

I now want to turn to a new subject, movie rights. If your Honor would like to proceed, I will go into that right now.

THE COURT: I would because I have to take a sentencing at two o'clock, which means I won't be able to resume until 2.15, and I would hate to adjourn so early.

MR. HRUSKA: Okay. Fine.

THE COURT: So let's go to a quarter of one.

Q I think we established before that the music rights transaction was one which encompasses both the synch. rights and the performing rights.

A Yes.

Q And in your organization that is handled by Miss Marion Mingle?

A Yes.

Q And she has been doing that for a long time?

A Many years.

Q We'll have Miss Mingle here this afternoon and we can go through that with her. I won't tie you up on that point.

Now, she handles approximately how many trans-

actions of this nature a year?

A I can only guess. I would say several hundred.

THE COURT: If she is going to testify, why don't we ask her?

MR. HRUSKA: Okay.

Q Have you ever been involved in movie rights transactions?

A No.

Q On any basis at all?

A Oh, well, occasionally I might receive a telephone call from a publisher indicating that somebody asked him for one of his compositions. But I would transfer him over to Miss Mingle as soon as possible.

5B

Q Do you know what factors affect the price at which these movie rights, combined sync and performance rights, are licensed for?

A Yes.

MR. TOPKIS: I object, your Honor. The witness has just, with respect, disqualified himself.

THE COURT: He may know some things and not others. I gather he just finished saying he does know the answer to this question.

A If the question is do I know the factors that would enter into the price, well, the importance of the song, the temperament of the publisher, the type of use, the importance of the motion picture production. That's about it.

Q When you say the importance of the motion picture production, do you mean the budget of the film?

A Yes.

Q And the higher the budget, the higher the movie rights fee?

A The tendency would be, if it is a big movie, that it would probably go up.

Q Can we agree to call the combined sync-performance rights deal the movie rights transaction, just for terminology?

A Yes.

Q What about the identity of the performer, the person who will perform a song in the film?

A Yes, that would have a bearing on it.

Q And when you say the type of use, are there basic categories that you would think of?

A Yes. There is a visual vocal, which would probably be a higher fee than a background vocal. There would be a background instrumental, a background vocal, and of course the length of these particular uses would have a bearing. If it is a full rendition, it would have one price. If it is a thirty-second use, it would have another price. Miss Mingle is very specific about these things.

Q Isnt there also a category called vocal instrumentals?

I'm sorry. I meant visual instrumentals.

THE COURT: I will say I agree with you in general, Mr. Topkis. If we are going to have the expert here this afternoon, I don't know why we don't ask her those questions.

I gather Mr. Berman agrees that Miss Mingle is more competent on these particular fine points than he is.

THE WITNESS: Yes.

MR. HRUSKA: All right.

Q On television synchronization rights, that I

gather is handled by Mr. Finell?

A Yes.

Q How long did it take Mr. Finell to acquire the necessary facility, skill, knowledge and expertise to head up that operation?

A I don't recall exactly. He took fairly complete charge some time in 1968 or so, and several years before that he was with the organization.

Q Did it take him several years to acquire the necessary facility, skill, knowledge and expertise to head up that operation?

MR. TOPKIS: If your Honor please, for all I know Mr. Finell was a skilled copyright lawyer before he ever saw Harry Fox.

THE COURT: For all you know. Mr. Berman is being asked if he knows how long it took him to train himself or to be trained. I'll allow the question.

A I know it would certainly take several years. It certainly, I think, would take several years for a novice to become acquainted with the business.

Q What did Mr. Finell do before he came to the Harry Fox Agency?

A I believe he was employed by ASCAP.

Q In what capacity, do you know?

A I don't know.

Q Was Mr. Finell a novice when he came to the Harry Fox Agency?

MR. TOPKIS: In what?

THE COURT: Are you going to have Mr. Finell here at all?

MR. HRUSKA: No, your Honor.

THE COURT: Well, maybe we should, if we are going to ask about these particular things.

What do you mean? As a novice at what?

MR. HRUSKA: As a novice --

THE COURT: At synchronization rights?

MR. HRUSKA: In the musicpublishing business.

A Basically I would say that his experience at ASCAP and whatever he did would just make him acquainted with the names of publishers and the names of compositions. As far as television clearance, he would have been basically a novice.

Q And it took him several years to get to the point where he could perform this job effectively?

A I really don't know. He may have been able to perform it a lot sooner than he had the opportunity to do. All I know is that about 1968 or 1969 he performed his job well.

Now, whether he could have done it sooner, I don't know.

Q Well, at page 88 of the transcript of your deposition, starting with line 3, this question was put to you and you gave this answer:

"Q How long did it take Mr. Finell to acquire the facility, skill, knowledge, expertise, whatever it is, to head up that operation?

"A Several years."

MR. TOPKIS: The witness just said --

THE COURT: You just told him what he said. Now what is the question? Does that refresh his recollection?

MR. HRUSKA: Yes.

A In effect I think I basically said several years.

Q How many television synchronization rights licenses does the Harry Fox Agency issue in a year?

A I don't know. I can only estimate. Several thousand.

Q And would each one of those licenses be likely to apply to more than one song, several songs?

A Yes.

Q Do you know what the total annual dollar volume in the synchronization rights business handled by Fox is

television synchronization?

A I would estimate it ranges between three-quarters of a million and a million dollars, closer to three-quarters of a million.

THE COURT: You mean that is what the publishers receive through you.

THE WITNESS: Yes.

THE COURT: That is not your commission.

THE WITNESS: That is not our commission.

THE COURT: I think this might be a good time for us to stop, Mr. Hruska.

I am sorry to say I do have a criminal matter I have to take care of at two o'clock. So you don't need to be back here until about ten minutes after two.

MR. HRUSKA: Your Honor, the witness has a problem.

THE WITNESS: I have a problem. We have an annual meeting this afternoon, and I tried to get --

THE COURT: Of your company?

THE WITNESS: Yes.

MR. HRUSKA: I will be happy to resume the examination of Mr. Berman tomorrow morning and take Miss Mingle this afternoon.

THE COURT: That is certainly all right with me.

MR. TOPKIS: That is all right with us.

THE COURT: All right. Then why don't you come back tomorrow morning.

THE WITNESS: Thank you, your Honor.

(Luncheon recess.)

AFTERNOON SESSION

2:15 p.m.

THE COURT: I assume we are ready for Miss Mingle.

MR. HRUSKA: Yes, your Honor.

M A R I O N B. M I N G L E, called as a witness by the plaintiff, being first duly sworn, testified as follows:

THE COURT: Will you keep your voice up? I don't whether sitting back there you realize it's hard to hear, but it is.

THE WITNESS: I shall try to.

DIRECT EXAMINATION

BY MR. HRUSKA:

Q Miss Mingle, are you employed by the Harry Fox Agency?

A I am.

Q In what capacity?

A No title. I've handled motion picture so-called synchronization rights. That's what we refer to it as.

Q Is that typical transaction, the issuance of a license which includes both the synchronization right and the performance right?

A It's a synchronizing right and to the extent

of the performing right, the United States theatric performing right, if it's a theatric film.

Q And these are licenses which permit the producer of a theatrical motion picture to use the composition involved in a theatrical motion picture?

A That's the intent as I understand it.

Q When did you start at the Harry Fox Agency?

A Early in 1940.

Q And at that time, what was your job?

A Pretty general clerical work and then, as secretary to the two gentlemen who were head of the organization at that time -- Mr. Harry Fox himself and Mr. Walter G. Douglas.

Q And at some point you got into the handling of motion picture rights, transactions?

A Three or four years later, I think it was. About four years later, when I began to assume this under Mr. Fox's supervision.

Q About 1944?

A About 1944, I would think.

Q Does the Harry Fox Agency charge music publishers a commission for the movie rights transactions which it handles for those publishers?

A Yes. We represent the publishers and they pay us

a commission on any fees collected.

Q What is that commission?

A The commission basically on a synchronising right is ten per cent. On a United States theatric performing right generally it's five per cent.

THE COURT: Do you receive that from the publishers?

THE WITNESS: The publisher, yes.

THE COURT: You said United States performing right is five per cent?

THE WITNESS: United STates theatric performing rights and this is important because we don't handle any other performing rights.

Q So, if you got a licensing transaction in which the fee is, let's say, a hundred dollars for the theatrical performs rights, U.S., and $150 for the world-wide synchronization rights, the commission would be ten per cent of the $150 and five per cent of the $100?

A Yes. There are some slight variations in this.

Q Could you tell us about those?

A Well, for many of the larger publishers for whom we do a great deal of work, there is a top fee of $150. If -- in other words, if the transaction is over $1,500, there is a top fee.

Q And that top fee, ceiling of $150, applies only to some publishers and not to others?

A That is true, yes.

Q So that if --

A The large publishers would have frequent transaction there are few exceptions to it.

THE COURT: I am not clear about what you just said.

Are you talking about a top fee charged by the publisher to the motion picture producer?

THE WITNESS: No. I meant our top commission.

THE COURT: Your commission?

THE WITNESS: Yes.

Q So, then, if a publisher who was not in this category obtained a fee from a movie producer of $2,000 for the synchronization side of the license --

A Or the combined.

Q Or the combined, okay -- and that transaction was handled by the Harry Fox Agency, that publisher would pay more than $150?

A Yes.

Q As a commission to Fox?

A There are a few to whom this applies.

Q And, generally speaking, it's the smaller

publisher?

A No, no, quite the contrary. It's very often a foreign publisher.

Q What is the criteria used by the Fox Agency to determine whether a publisher will be in the category of having that $150 ceiling or outside of that category?

MR. TOPKIS: Objection, your Honor, on the ground of relevance.

THE COURT: It doesn't seem to me that we need these details.

I can understand why you want to find out in general from members of the Fox Agency how they secure the information necessary to service their clients and what their general approach towards the payment of the commission is, but I really don't see the need of details of how they decide who they are going to charge "X" instead of "Y."

I don't think it would be applicable in your situation, if we knew.

1B MR. HRUSKA: By way of offer of proof, to explain why I am going into something which I grant, on the surface, certainly looks irrelevant, one of the things we are trying to show is the fact that the Fox Agency really handles these transactions at relatively low cost. Its commission structure --

THE COURT: Let's assume that that is so. Why do we have to worry about how they decide that X pays a dollar and Y pays $2.

MR. HRUSKA: Right, your Honor. Simply to the extent that the cost of acting as a clearing house for transactions of this nature has a bearing on the feasibility point in the case.

We think there is some relationship there. It's not a --

THE COURT: I am even prepared to believe that may be true but I don't see what difference it makes how they decide what they would charge.

MR. HRUSKA: If it is true that the Fox organization covers its costs through the commission it charges, we would like to know precisely what the commissions are.

I now understand from Miss Mingle that I gather in most cases the preponderance of cases, it's that 10 per cent and 5 per cent structure, but with the $150 maximum.

THE COURT: I got that.

MR. HRUSKA: I simply wanted to get clear the extent to which that $150 maximum does not apply and why it doesn't apply.

THE COURT: Well, I continue to believe that that experience wouldn't necessarily be transferable. If it's to be sure that it is a low cost, I will be glad to hear in what percentage of cases do you think the $150 maximum applies, if you can make such an estimate.

THE WITNESS: It would apply in most cases. The others, the deviations are minor transactions.

Q Could you describe the steps in a typical movie rights transaction?

A Well, an inquiry comes into the office either by letter or a telephone call and the producer asks if he can get a quotation to use a certain musical composition in synchronism with a motion picture. He describes the type of motion picture.

First of all, we must find out if we represent the publisher. We do that by looking it up in our index files.

Q This is a call, if it is by telephone, that you would take?

A Or my assistant.

Q Right.

A But they come, presumably, to me.

Q Could we do this in terms of a call that you received, so that we get it firsthand. You get the call or the letter --

A Or I get the letter, and we look up the card to make sure we represent the publisher and that the title was correct and we can identify it properly.

Then, I either telephone, wire or write to the publisher, if he has an unlisted phone or something like that, and give a description, as the producer has given it to me -- the title of the film, the length of the film, the type of rights they want to clear, the territory to be cleared, the way the composition is to be used and the length and number of uses.

If this is not in the producer's original inquiry I will have to get it from him. Sometimes I have to write, or I call him, he has to call me back or, eventually, we get all this information, preferably before we contact the publisher, or else you are involved in a great many unnecessary calls.

We contact the publisher and ask the publisher what he wants to charge for this. That's all.

Then, we give that quotation to the producer

very often verbally, first, and confirm it in writing, as soon as we can afterward.

Q Then a deal is made or it is not made?

A That's right.

Q The producer agrees to that price?

A He either accepts it or he rejects it for some reason.

THE COURT: Does he sometimes make a counter proposal? Does he say, "I don't want to pay $1500 but I will pay you a thousand"?

THE WITNESS: Ocassionally, yes. If you say $5000, he may come back and say, "Look, the budget for our film won't allow more than five hundred."

Then, I must go back to the publisher and ask him what he wants to do.

THE COURT: You don't negotiate; you simply as as the transmitter of information?

THE WITNESS: That's right.

Q You sometimes get requests for quotations from producers who do not know the owner of the song, the identity of the owner?

A Occasionally. Not very often. They may not know the current publisher. They may have the copyright information and know the publisher only, but then we will know -- we can identify the successor company.

2A

Q They may have the sheet music, you mean?

A They may. They may have a record.

Q A phonograph record?

A They may have any number of ways of finding out.

Q Whether they think they know or they don't know, you would check in your files to make sure you got the owner of the song?

A We must have the right composition. We do not want to make quotations on guesswork and give a quotation for a publisher who has no interest whatsoever in the song that the producer wants to use.

Q And to make sure you know the name of the publisher, you check the index cards that are maintained by song title?

A Yes.

Q Is it sometimes true that your index card file does not have a card on the song for which the producer has sought a quotation?

A Yes. It may be so new that it is not there yet or is out for some correction.

Q Or had never gotten into it?

A Maybe so.

Q And what do you do in those circumstances to make sure you've got the name of the owner?

A We urge the producer to find out his source.

Q Right.

A And if he is referred to a phonograph record or he has taken it from a book or he has the sheet music and he says, "I don't know," then I say, "Well, go ask your performer or the person who chose this music. They didn't pick it out of the air."

They do if it is a very well-known song, in which case we can probably help them to identify it properly. People sometimes sing to me over the telephone.

THE COURT: Can't you find this out from the Copyright Office?

THE WITNESS: Well, that would take too long, generally. We have experienced people in the office who have a general knowledge of writers and what publishers handle certain writers' songs. It is not just a matter of going to a file and picking out a card. There is in our peculiarly -- I think it is a rather unique business in this. The information experience serves as an index, really.

Q Do you ever call up ASCAP or BMI or Sesac to see whether their records can help you identify the owner of a song?

A Yes. If a producer can't find it for himself

and we think there is a chance, we represent the publisher. ASCAP index department is very cooperative. So is BMI index department and so is Sesac index. And many times I've called all three places to try to see if they have any listing of a composition that the producer wants.

He may have the title twisted, and sometimes the people in those index departments, especially if I know the writers' names, have the same sort of memory that we have, from experience, and sometimes they can identify them.

Then I will go back to the producer to make sure that is the thing he wants..

THE COURT: You sing it to him then?

THE WITNESS: No. I try not to.

Q Before you go back to the publisher to give him the information that you have gleaned from the producer about the song and the use or any information you've gleaned from your own files, do you also check the publisher's file to see what he has done in similar circumstances?

A Rarely. I would ordinarily not refer to any previous transactions of the publisher unless he doesn't recall and asks me to.

Q He may ask you.

A He may ask me do I recall what they have done under certain circumstances.

Q What the publisher has done.

A Yes. The publisher, not only as to price but terms and various things. And then we go to reference files that we maintain for a limited number of years just as a ready reference.

Q Would you also go to the files you maintain on the movie producer to see what that producer has paid in the past?

A No, no. We wouldn't because each picture is different. What a producer will pay or his budget will allow on one picture might be quite different than the next picture.

Q I understand. But do you ever get inquiries from the publisher as to what this particular movie company has paid in the past?

A Not directly so.

Q Indirectly?

A No. I mean it isn't this positive a thing. A publisher may say -- well, let us say he gives me a figure and I may remark, "This is going to be high for this producer's budget," because of some experience that I've had recently with that producer, and then the publisher says, "Well, then let them have it, but I'll consider reducing it later." Or he may change his mind then.

Q How about the reverse of that situation, where you might comment that "I think this producer will go higher than that."?

A No, I'm not apt to say that.

Q Okay. What do your publisher files contain, the files you maintain by publisher name? What type of material is in those?

A They contain generally a carbon copy of a letter or an extra carbon copy of a license which has been issued for a certain purpose, when the publisher has changed his policy on anything, and we just throw it into this reference file chronologically, as I say, for a convenient reference.

Q That would include changes in policy with respect to the type of license form that a publisher wants to use?

A Yes.

Q In a completed movie rights transaction, there has been a meeting of the minds between the publisher on the one hand and the producer on the other hand, a deal is made, a license goes out, who does the billingof the producer for the fee?

A We draw up the license. The Harry Fox Agency draw up the license and sends it to the producer with the bill.

Q Right. So Fox bills the producer.

A Yes.

Q And does Fox also collect the money from the producer?

A We collect the money from the producer.

Q And then you distribute the money to the publisher?

A Less our commission.

Q And if there are two or more publishers and there is an ownership split, you would distribute the money in accordance with the --

A Their instructions.

Q The co-publisher's instructions?

A Yes.

Q To the Harry Fox Agency?

A The two or three or whatever there may be.

Q Within what period of time do you aim to get the publisher's quotation to the producer?

A We would like to get it and get it back to the producer within a couple of days. But increasingly now it takes much longer sometimes.

There are various factors: individuals in each company, generally an executive or an attorney, would be the only person who passes upon a motion picture clearance. If that man is out of town and can't be reached, if he is ill or if for some reason he is incommunicado, then I try

to warn the producer that that quotation will be delayed.

Q You can generally do it within a week, can't you?

A Oh, yes.

Q And is a week generally adequate from the movie studio standpoint?

A They've lived with it for a long while, so I think it probably is.

Q You say you like to do it in 48 hours. Can you do it faster if you have to?

A If I'm lucky, I can do it faster. It is not when I have to. It is when I can get the proper person.

If a call comes in from California at 5 o'clock our time or 5.30 our time, when our switchboard closes, I am not likely to be able to get the publisher and call back California that day. I must wait until the next day.

Q Is it possible to estimate the percentage of these transactions that you in fact are able to get the publisher's quotation to the producer within two days?

A No, I couldn't estimate that. We handle so many small uses of films, so many things for schools or individuals, small transactions, they sometimes are delayed longer.

AQ How about the major studios?

Major motion pictures?

A Major studios? We are reasonably well able to get quotations back to them within a few days. If we can't, we try to explain to them why.

Q You handle a great many quotations and requests for quotations that do not actually develop into a license transaction, a completed license transaction?

A Yes. It seems to be in the nature of the producing business that they ask for more thanthey can ever use.

Q Ask for quotations on more songs than they can use?

A Than they can use or eventually do use, for their own reasons, whatever they may be.

THE COURT: Well, it is like going into a store, isn't it? You price a half-dozen dresses even if you think you are only going to buy two.

THE WITNESS: Yes.

Q What is the price range on these movie rights deals that combined sync-performance rights?

MR. TOPKIS: Objection, your Honor. If Mr. Pinell, the TV man, were on the stand, I could understand this inquiry.

MR. HRUSKA: Movie rights.

MR. TOPKIS: I understand.

THE COURT: The question is, what is the difference about movie rights? If it was a dollar or a million dollars, what would it tell us about our own case?

MR. HRUSKA: Very little. But I think, if the answer were to come out, it would tell us a good deal.

THE COURT: That's what we are trying to get at. My question was too facetious, but what will we learn from the price of the movie rights that will be related to our own case?

MR. HRUSKA: Yes, your Honor. There has been a contention in the case on the part of the defendants regarding the effect on prices in the event of a per use world for network television. While we have Miss Mingle on the stand, even though this is more in the nature or rebuttal, but since Miss Mingle is here, I think it would be instructive on that point to learn the price range that motion picture companies pay for these rights.

THE COURT: Let me say, I'll take it subject to connection. I am not quite sure whether it will be connected.

BY MR. HRUSKA:

Q Miss Mingle, what is the price range on the movie rights deals?

A The price range is very wide. It can be from as

low as $250 to $20,000.

THE COURT: We are talking about the rights to a song?

THE WITNESS: A song for one motion picture.

Q And how often is that price below $750?

A Not too often.

Q Would you agree with me --

A For a world, right. I'm talking about a world theatric and United States theatric performing right combined license.

Q Would you agree with me that it is very rarely below $750?

A I think I could say so, considering the number of transactions a year, which aren't many, really.

Q Could you tell us the factors which in your experience have influenced the price?

A Well, first of all -- I won't put these in rotation of their importance because that varies with the situation.

There is territory, whether it is the world or a limited territory. There is whether the picture is a feature or a short or a 45-minute to one-hour featurette. The length of the film has some bearing on it. The subject matter of the film in relation to the subject of the composition; in other words, how the composition might fit

into the script. And the type and number of uses to be made and the length of uses in a film.

They, I think, are the basic factors.

Q What about the identity of the performer?

A I don't think that's one of the foremost factors, because that can swing one way or the other.

Q Yes. Let me make it more precise. Suppose the song is associated with a performer.

A Well, I would assume, and I don't know this because I'm not a publisher, but I do believe from my experience, that some publishers might be -- if they were eager to have the song used by that performer, if it was a close relationship, then the producer might benefit.

On the other hand, if it was a composition where the publisher had no tie-in or there was no writer or any other tie-in with an important, very popular performer, they would consider it worth more money.

Q Well, for example, to clarify this, if the producer of the Eddie Cantor Story, which I believe was a motion picture, wanted to use If You Knew Susie, which I think was associated with Eddie Cantor, would that be a factor which would be likely to influence the price upwards?

THE COURT: Wasn't that the very thing Miss Mingle

was talking about when she talked about relationship of the subject of the song with the subject of the film?

THE WITNESS: Yes. I think at the time Eddie Cantor was alive and was singing If You Knew Susie, that might be a factor. Now it might not be.

Q I may have misunderstood your answer, but it seemed to me that the fact that the producer wanted to make the Eddie Cantor Story and could not make it as well without the song If You Knew Susie would be a factor which would strengthen the publisher's bargaining position so that the publisher would expectmore money for that, not less. This is the point.

A That is something the publisher has to answer. I don't know.

Q You don't know that.

A I don't know. I don't decide this.

2B Q Did you mention the budget of the film as being a factor influencing the price of the movie rights license?

A I didn't mention it, but it never used to be mentioned at all. But now that so many so-called low budget motion pictures are turning their producers into millionaires, it can be a factor to the advantage or disadvantage of the producer, because if an up-to-date song that is very popular right now is going into a low-budget picture, I know from talking with some publishers that they feel that that song is going to make the picture.

Here is one case where the importance of the performer and the use of a number in a picture can enter into it without the factor of the budget of the film having serious consideration by the publisher.

THE COURT: Miss Mingle, I take it that when a producer gets in touch with you for the use of a film he does not ordinarily at least, tell you what his budget is.

THE WITNESS: No, he does not.

THE COURT: He might tell you, I suppose, in the instance you indicated before, where your publisher came back and asked for a price which the producer considered high, and then he might cry on your shoulder and say, "My budget won't allow that," is that right?

THE WITNESS: That's right But there is also

another factor. Today, many films are being made by what they call independent producers.

THE COURT: Yes.

THE WITNESS: These people don't have a lot of cash available and, I suppose, will rely upon the money they get from a distributor before they even pay for their music. They will sometimes volunteer and say, "Well, look. Go easy on me because this is only a $200,000 film."

But, as I remarked today, a $200,000 film often turns out to be a Kimberly.

THE COURT: I take it that that's good, a Kimberley?

THE WITNESS: So this is up to the publisher.

Q Perhaps that last answer can be clearer in the record. What is a Kimberley? Is that the word you used? Is that the name of a motion picture that has been a big success?

MR. TOPKIS: It is either a diamond mine or a gold mine, I'm not sure which.

Q Oh, is that what you meant?

A I thought of diamonds when I said that.

MR. TOPKIS: A girl's best friend.

(Pause.)

Q Do publishers ask you if you have learned about

of the film?

A Occasionally. The publisher is not primarily interested in that. The producer sometimes uses it as a talking point.

THE COURT: If it is low.

THE WITNESS: Yes, if it is low. Oh, if it is high, he says nothing.

THE COURT: And that's how you know it is high.

Q What about just the subjective attitude of the publisher with respect to a particular song on which you've been asked to get a bid? Is that a factor that could influence the price?

MISS KEARSE: Objection, your Honor.

THE COURT: I think you are asking Miss Mingle an impossible question, as to what somebody else's subjective attitude is.

MR. BRUSKA: Let me withdraw the question and put it this way.

Q Do you have any basis in your experience to form an opinion as to publishers' subjective attitudes that their own songs or one of their songs could be a factor in the price thatthey quote?

MR. TOPKIS: I object on the ground of relevancy. Suppose the publisher does lower one particular song --

THE COURT: I'm taking this whole price of the song question subject to connection.

Do you understand the question? Would you like to have it read back?

THE WITNESS: Yes, I would.

(Question read.)

A You mean the publisher's own estimate of the value of one song against another in his catalog?

Q I guess it is a hard question. What I really mean is an emotional involvement by the publisher with a particular song.

A Yes, because he would stack one song against another in the catalog and think, for some personal reason, it was worth more?

Q Yes, right.

A I've never been aware of any such thing.

Q In those circumstances where you've gotten the quotation from the publisher and you give it to the producer and the producer says, "That's simply too high. Go back to that publisher and get me a lower price," is it common in your experience that the publisher will not reduce the price?

A I think possibly it is fifty-fifty. Depending on the publisher, some will and some won't, and the circumstances, of course. If the publisher has considered the

value of the song very definitely, he will not reduce it.

Q Will your ability to get further information from the producer sometimes affect the publisher's willingness to make a price concession?

A Yes. If I can get more specific information -- for instance, the producer will ask for a visual vocal use of a certain song. Visual vocal can mean anything. It can go on forever, because the producer can't tell him exactly how he wants to use it. The publisher may say visual vocal, but only up to three minutes give a quote. Then the producer comes back and says, "We only want it for 30 seconds," or "It has a background, but you are not going to see the singer on the scene."

In most instances of that nature the publisher will reduce the quotation.

Q You just reminded me, Miss Mingle, of something I meant to ask you before. You had mentioned as one of the factors influencing price the type of use. Are there certain basic categories in your mind as to type of use?

A Yes. Generally in the industry everyone thinks of visual vocal, background vocal, visual instrumental and background instrumental, depending on whether you see the performer or the screen or the box from which it comes.

Q You also mentioned before that sometimes a

producer will give you a list of several songs when they only have one slot in the film to fill, for example. Does that happen pretty often?

A We don't ordinarily know it. They don't tell me they only want one of four.

THE COURT: If they did, how would you know where to start, unless they were all for the same publisher?

THE WITNESS: We get all four quotations.

THE COURT: I see.

THE WITNESS: If the producer is doing a night-club scene, for instance, and he calls me and says, "I would like a quotation on four different songs, four different publishers" --

THE COURT: But nobody ever calls you and says, "We only want one song," and you pick it.

THE WITNESS: Oh, no. We select no music at all.

THE COURT: You just get information and transmit it.

THE WITNESS: Oh, we wouldn't dare. We represent too many publishers. That is altogether out.

THE COURT: So I assumed.

2 Q Isn't there any way you get a feel as to when the producer is shopping for price?

A What is that?

Q I say, isn't there some way that you get to know whether the producer is shopping for price?

A Well, if we give a quotation for a certain use and then he calls back the next day without asking for a reduction and wants something else for the same situation, the same kind of use, I might think that they are fishing. But very often in cases like that it is the same type of song because they need it for a certain scene and it has no advantage.

Q Have you had situations in which the producer has asked for a quotation and when they got it back from you he said, "That is too high. Get it lower"? and the publisher would not lower the price and the producer would press and press you to get a lower price, indicating that he wouldn't take the song unless it was a lower price, and yet ultimately came crawling back and took the song at the price which the publisher stuck to?

A There is occasionally an instance of that, yes.

THE COURT: I suppose occasionally, with the number of transactions that you have handled each year for so many years, every possible variety of thing happens, doesn't it?

THE WITNESS: Everything.

MR. HRUSKA: That is simply what I wanted to bring

out.

MR. TOPKIS: There goes a whole line of questioning.

Q Do you feel, Miss Mingle, that you have developed a certain expertise which enables these transactions to be made more rapidly than they would be made if they were handled by someone without your expertise? I am asking you to be immodest, but that's the question.

THE COURT: I will decide that for her. Yes.

MR. HRUSKA: Okay. All right.

Q With respect to particular publishers, have you gotten to learn what a particular publisher wants to know about the use planned by the producer so that when you have that producer on the phone in the first instance you can ask the right questions?

A Yes, very often. There are certain publishers there is no use in my calling unless I know how it is going to be used and to what extent. They simply won't give me an answer and it is a wasted telephone call.

Q Do you also know the right person to call at the publishing company?

A There is generally one person in every publishing company we deal with who passes kindly on motion picture rights.

Q And do you know who at the publishing company can give you a quick answer?

A Yes.

Q Do you have an assistant in this work, Miss Mingle?

A Yes, I do.

Q Her name is --

A Lois Mastramano.

Q Do you know how long she has been working for the Fox Agency?

A She has been there more than ten years. I could not tell you how much more.

Q She works under your supervision?

A Yes.

Q When you are not there, she functions as best she can as Marion Mingle?

A Yes.

Q How long did it take Miss Mastramano to get to the point to function in your place, if you were not there?

MR. TOPKIS: If Your Honor please, it seems to me that that question focuses on one person whose aptitude is totally unknown to us. I can't cross examine meaningfully on that and the whole question of how long it would take somebody to become a Miss Mastramano, based on how long it took Miss Mastramano to do it, is a waste of time.

THE COURT: I think what happened before, what may be more meaningful, would be what Mr. Berman answered when

he estimated how long it would take somebody to learn that job.

So, let's leave Miss Mastramano out. She is not here to defend or praise herself.

MR. HRUSKA: Your Honor, I would respectfully urge reconsideration on that. I regard this question as one of the most significant questions that we can ask Miss Mingle.

We asked the question on a deposition. Of course, there has been an answer. My colleagues at the table can laugh and snicker about that but the fact is that there is one human being on the face of the earth who has served as Miss Mingle's assistant.

THE COURT: Then let's get both. I really must say I am terribly confused as to how something as narrow as that can have significance in a huge antitrust case of this sort.

Let's have both answers, both as to Miss Mastramano and to the general situation.

Q How long did it take Miss Mastramano to get to the point where she could function in your place when you were not there?

A Actually, as of the present time, she is quite capable of doing practically everything in my absence except she might on occasion have to refer to Mr. Berman for the authority or procedures, something like that.

Prior to that time, she -- when Mr. Fox was alive, and I think he passed away about three years ago, didn't he, she always had him to go to for information.

THE COURT: So, are you saying --

THE WITNESS: I would say it would take a girl, anyone, 6 or 7 years to work into it.

Incidentally, I think Miss Mastramano, come to think of it, has been with us much longer than that. I think it's more than 15 years. I meant to look that up, because I was asked before, but I didn't.

THE COURT: Anyway, the answer to how long it would take to learn your job and be able to do it in case, God forbid, you weren't able to, is about 6 or 7 years?

THE WITNESS: I would think so.

THE COURT: I suppose you are assuming some normally intelligent and well organized person.

THE WITNESS: And somebody who already had some experience in our office or business and had the basic ground work; some knowledge of copyright, some knowledge of music and procedures.

Q Do you have any regular procedures in your office, Miss Mingle, to check to see whether a theatrical motion picture has used a musical composition without a license?

A No, no definite procedure to follow up on it.

We do get music cue sheets and, for all the films, we try to get them; definitely for all the films where we have any quotations or licenses, and in scanning them, we might come across something.

Otherwise, most reports of things like that come to us from publishers or writers or some interested party who has been told that something is in a film or sees a film.

Q Why do they report it to you?

A So we will try to clear it.

THE COURT: What do you do? Do you get in touch with the producers and ask them what they are doing?

THE WITNESS: Ask them why they didn't clear this and then try to settle it and, in most instances, I would say it is settled amicably; that we can generally arrange a post-production license.

Q In your experience, is a theatrical motion picture unauthorized use of a musical composition a rare occurrence or a frequent occurrence?

A It is not frequent. I would say it is a rare occurrence. Right at the present time some of the underground pictures are, of course, involved, but nobody knows who produced them. There is no way of tracing them.

Q But on legitimate films --

A No. The penalties are too high and a good producer

or distributing company knows it.

MR. HRUSKA: I have no further questions.

THE COURT: All right.

Mr. Topkis?

MR. TOPKIS: I just have a couple, your Honor.

CROSS EXAMINATION

BY MR. TOPKIS:

Q Miss Mingle, I don't want to try to pry into your current salary; it's none of my business. But, if CBS were to offer to double it, would you be inclined or disinclined to listen to that offer from CBS?

A Definitely disinclined.

Q Why is that?

A Well, my age, alone.

Q If you were able to probe into Miss Maltramano's mind, how do you think she would feel?

A She would have to speak for herself.

Q You were referring to factors which influence the price that a copyright proprietor might consider, might be wanting to get for a composition, factors that would go into a copyright proprietor's determination, publisher's determination as to what he wanted for a movie right and I think you ticked off territory and the length of the film and the subject matter of the film and the type and number of uses.

Are there any others that occur from time to time?

A Did I say the type of release, the rights -- the release rights he wants under the license? That is another factor -- whether he wants it just for theaters or whet he wants it for theaters and television or other combined -- the types of release of the film are a factor.

THE COURT: What you said was the territory, the length of the film, the subject of the film in relation to the subject of the song, the type, number, length of uses, and you have just added now the type of rights.

THE WITNESS: Yes; the rights.

Q And, on occasion, the identity of the performer?

A Well, in generaly, the more information the producer can give as to who is going to sing it and something of the scene, especially if it's a well-known composition, the easier it is to get a prompt decision on quotation.

Q Would it be accurate to say that publishers vary widely in terms of how much information they want?

A Yes.

Q Some will be much more exacting and some less?

A Yes.

Q Is Irving Berlin notorious in the industry for wanting to know every last detail of how his songs are going to be used?

A I wouldn't say he was notorious but he wants to know how his song was going to be used, but he not only wrote it but publishes it and owns it, lock, stock and barrel, and he is probably more interested, more demanding, let us say, than other publishers might be.

3B Q I seem to have just one other question, Miss Mingle.

Who published If You Knew Susie?

A Shapiro-Bernstein.

MR. TOPKIS: Thank you very much.

CROSS EXAMINATION

BY MISS KEARSE:

Q Miss Mingle, is the identity of the song also a factor in the publisher's placing a value on the rights?

A The identity of the song itself?

Q Yes, the identity of the song, itself.

A Their own value or opinion of the value? Oh, yes.

Q In a situation in which a producer asks you for quotations on a number of compositions and then uses fewer than the whole number he is asking you for the quotations on, does the producer usually tell you why he has not chosen to use those he has not used?

A Occasionally, he will, but generally not.

Q So, as far as you know, he could have chosen not to use the song simply because it did not meet his creative needs, is that right?

A Very often that is true; very often that is true, yes.

MISS KEARSE: Thank you. I have no further questions.

MR. HRUSKA: I have just two.

REDIRECT EXAMINATION

BY MR. HRUSKA:

Q Are the movie rights licenses generally issued for the life of the copyright?

A Either for the life of the copyright or there is an inclination of some publishers now, if it's a very new copyright, to limit them to the first period of United States copyright, duration of the first period of the United States copyright.

There are some publishers who do that now.

THE COURT: You mean not for the renewal period?

THE WITNESS: Not for the renewal. It will be limited.

You see, if a copy is only two or three years old, then they will limit it to the first -- the balance of the first period of the United States copyright.

Q Is there an option in the producer to have a license for the renewal term of the copyright?

A No. So far, no publisher that I know who was -- who wanted to issue it only for the United States -- for the limited period, has not added an option for an additional

period, but many licenses read "For the life of the United States copyright and renewal period," provided the publisher owns and controls it. That is generally the wording in the license.

Q I didn't mean to pursue this too long, but I must say it confuses me to know why, to hear, that a movie producer would accept a license to a song for less than the life of the copyright.

THE COURT: I think you better ask that of a movie producer.

I could say if it has 25 years or 14 years to run, whatever it is, it might be appropriate.

Rockefeller Centre accepted the land at Rockefeller Centre for only 99 years but that building may be there afterwards.

Q Apart from your deposition, have we ever met or talked prior to today?

A No.

MR. TOPKIS: May I ask one other question.

RECROSS EXAMINATION

BY MR. TOPKIS:

Q When you obtain quotations from publishers, as to the prices that they are willing to accept for their work, are those quotations good for a specific period of

time, such as 90 days, or something like that?

A The average publisher will give a producer 90 days and, since it ordinarily takes longer than that to produce a film, most publishers will grant an extension, if the producer asks for it -- another 90-day extension on the quotation.

Q That is to say, the publisher is bound for at least 90 days, typically, and the producer doesn't go firm until he wants to?

A That's right.

MR. TOPKIS: Thank you very much.

THE COURT: All right?

Thank you very much, Miss Mingle. You are excused.

(Witness excused.)

THE COURT: We might as well take the afternoon recess at this time.

(Recess.)

THE COURT: Do you have another witness?

MR. HRUSKA: No, your Honor.

THE COURT: I am disappointed, because there is 40 minutes or an hour of trial time I would like to utilize but I don't know that there is anything we can do about it at the moment.

MR. HRUSKA: The only thing I could do right now would be to go ahead with the readings.

THE COURT: Would you be prepared to go ahead with readings?

MR. TOPKIS: I received, this morning, the list of reading that my adversary has proposed to do and it is in form that I find totally unacceptable.

Specifically, this list embraces the proposed testimony of at least two witnesses, at a quick glance, who are not parties to this litigation and who in no way are proper people to have their depositions read.

Indeed, one of them is scheduled to be the next witness in this case or the next witness after -- Mr. Arrow.

More than that, it is proposed to read on five separate occasions from the testimony of Mr. Brettler, on four separate occasions from the testimony of Chiantia, and we are going to have bits and snippets read from everybody's deposition in every order and, if anything is clear, your Honor, that is no way to proceed in the reading of depositions.

I have some authority on the subject and I would be delighted to call it to your attention.

THE COURT: Would you do that?

MR. TOPKIS: If I may, the case in mind most

specifically is the First Circuit decision, Westinghouse Electric. It is 286 Fed. 2d 491, decided in 1961 and, in addition, my old friend, Charlie Wright, in his treatise on the Rules of Civil Procedure --

THE COURT: Not the one in the Federal Court, the book in the Federal Court? One of his books is called Federal Courts.

MR. TOPKIS: This is Wright and Miller. That's Federal Courts. It is at Section 2148, on page 465.

THE COURT: Is that his Federal Courts, you are talking about? What is the name of the book? Let's be sure.

MR. TOPKIS: I'm sorry. I will go to my bench.

MR. GITTER: Your Honor, it is the Federal Practices and Procedures by Wright and Miller, Section 2148, Chapter 6.

MR. TOPKIS: I think your Honor would understand the problem if you had an opportunity to look at what's been proposed. I don't know whether you received a copy of it.

May I approach the bench to show it to you?

MISS KEARSE: May I add to what Mr. Topkis said? We also did not receive this until this morning and, in addition to the five depositions that Mr. Hruska indicated

he was going to read yesterday --

THE COURT: For whatever it is worth, I gather that you were both informed last night, although you didn't receive a copy of the letter --

MISS KEARSE: That is not correct, your Honor. We were not informed.

We were told by telephone at a quarter of 9 last night that the list was too long to read and that we would be given a letter this morning.

We were given a letter this morning and it has on it depositions not mentioned yesterday and I haven't had a chance to compare this to the original list, but I see just at a glance that one of them has some pages that weren't even included in the original list.

MR. HRUSKA: First, on the timing, Mr. Baker, who unfortunately is not here, of my office, called up last night -- the first call was the gentleman at Paul Weiss --

THE COURT: If he is not here, don't give me his version. You don't want to contradict Miss Kearse, I guess --

MR. HRUSKA: On the substantive point, there are two basic ways to do this, reading material on the record. We could do it as Mr. Topkis suggested, deponent by deponent. In other words, we could start off with, say,

Mr. Brettler and leave whathe said about, one, the Shapiro-
?? Bernstein dealings with 3M and what he said about the MCA
dealings and go through what Mr. Brettler had to say about
each publisher.

Then we could take a new deponent and do the same thing. I submit, your Honor, that that would be more confusing than to take it publisher by publisher, because the facts that we are trying to bring out that are important here and the facts that we are trying to bring out are how each publisher reacted to the 3M offer.

THE COURT: How many publishers are we going to be talking about?

MR. HRUSKA: Out of the nine publishers who do not deal with 3M, I think we will be talking about five or six. I have my bag there.

THE COURT: I don't need to know the precise number. I am trying to get the order --

MR. HRUSKA: About five or six of the publishers who did not deal and I believe three of the publishers who did deal.

THE COURT: So you are going to be talking about eight or nine publishers.

MR. HRUSKA: Yes, your Honor.

THE COURT: All right. And you described two different ways that can be done. When you say you think so and so would be more confusing than such and such, of course really I am the one to decide that, not just because of my authority but because I'm the one to whom it is

addressed.

MR. HRUSKA: Of course.

THE COURT: And I would like to think about it from my own subjective point of view. But I want to be sure, and I am asking Mr. Topkis, whom I can't see, whether Mr. Hruska is correct in saying that you are proposing that the depositions should be read witness by witness with regard to all the publishers rather than as topublisher by publisher.

MR. TOPKIS: That is correct, your Honor.

THE COURT: I'm not sure that I agree that there can be any authority on this which is binding in any way, but in any event I would like to see what other Courts have had to say on the subject, and I also want to consider what my own reaction to the possible methods of presentation is.

I must say that I don't think it is as clear as you do, Mr. Hruska, that one way would be more confusing than another and that I think in every trial I hear one witness after another who testifies about a number of things.

So I don't see that either party should really be terribly concerned about whether it would be more or less confusing to me, because that part of it I will decide.

The rest of it, the countervailing question, will be the ability of all parties logically to put before me what they would like, and I think that's what bothers Mr. Topkis.

MR. TOPKIS: Exactly so, your Honor. We got this list this morning. Under the pretrial order we are entitled to three trial days notice. If any procedure would be followed with reference to these witnesses other than the one that was last specified last week, I think those three days are what we are entitled to.

THE COURT: What do you mean by "specified last week"?

MR. TOPKIS: We were given last week a list of witnesses --

THE COURT: You mean if the list would be any different?

MR. TOPKIS: Right. And I need that time because I haven't looked at this letter I got this morning, and to start thinking in terms of these depositions, not in terms of witness by witness but snippet by snippet and what part I am going to have to read in response to each statement, I have to rethink --

THE COURT: I want to be sure I understand what you are talking about, witness by witness instead of

snippet by snippet, because even if we took all the references to Mr. Arrow's deposition here, which is this one, and you can see from that distance it is a lot of items, you are not saying that you are asking that anything from Mr. Arrow's deposition on any subject which Mr. Hruska wishes to read must be read at this time, are you?

MR. TOPKIS: I am. That is the way that I think we ought to proceed.

THE COURT: Well, that I'm rather disinclined to agree with.

MISS KEARSE: May I interrupt just for a second?

THE COURT: Yes.

MISS KEARSE: If you look at pages 2 and 3, you'll find four more references to Mr. Arrow. So we've not only got nine different people but we've got --

THE COURT: That I do understand and I sympathize with. My general reaction at the moment, which is not final, is this: that anything that is to be read from one of these depositions with regard to the 3M incident should be read from that deposition all at one time, even if it relates to more than one publisher, but that anything which may be read from that deposition with regard to another subject than 3M need not be read at that time.

MR. TOPKIS: That suits us.

THE COURT: But you still need some time.

MR. TOPKIS: Right.

THE COURT: I understand that.

MR. HRUSKA: May I comment briefly on that, your Honor? The week before the trial, because I had planned to use a lot of this material and some other material during the course of the Sipes deposition, we had given notice to the defendants of all the material we planned to read at that time from the depositions. The citations in the letter that your Honor has before you are included within those references which we gave to the defendants the week before the trial.

Now, yesterday, in the robing room, Mr. Topkis did comment that he had prepared counter-reading materials from that basic list. What we did last night, your Honor, was to take from the major list these references with respect to the 3M incident alone and we've listed them in the order that we had planned to read them, that is, publisher incident by publisher incident.

I certainly will be perfectly prepared tomorrow to read it deposition by deposition.

THE COURT: Well, it is a little hard for me to sort all of that out except to understand that you've

proceeded in good faith even if Miss Kearse and Mr. Topkis feel they need a little more time to prepare. But the most important thing is that we don't waste time. I don't care just when all thisstuff comes in.

Now, you have enough witnesses to go forth for how long starting tomorrow morning?

MR. HRUSKA: My rough estimate is that Mr. Berman, which necessarily has to be rough, will be about an hour, with direct --

THE COURT: Further durect, you mean?

MR. HRUSKA: No. I think the direct is --

THE COURT: Nearly complete.

MR. HRUSKA: Maybe a half hour on direct, and roughly a half hour on cross, and that would bring us until eleven.

The next witness is Mr. Lane, Burton Lane, who was the former president of Agac.

THE COURT: You don't need to do the computation out loud for me. I am just asking you to consider it to yourself.

MR. HRUSKA: That's the only way I can figure it out.

I think that Mr. Lane would probably go the rest of the day. I thought we could get these readings

in, which, as I say, would be about forty to forty five minutes tops, with those two witnesses.

THE COURT: Do you have another witness to follow him yet?

MR. HRUSKA: Well, I haven't heard from Mr. Baker at my office, who is supposedly in contact with Mr. Arrow, who it is planned will be the next witness, as to whether he will be available tomorrow. We hope he will be so that he could fill up any time that we didn't use, and we certainly hope he will be available on Thursday.

He has apparently just come back or is expected to come back today from a business trip he had in the Far East.

THE COURT: I am going to settle this in a Solomon-like way, which may have as much logic as Solomon's decision, and that is to say that I will not allow the reading of the depositions tomorrow but I will allow them the next day if you wish to put them in at that time, and that the procedure I'll follow will be that anything to do with 3M from anybody's deposition is to be read at one time but the material not relating to 3M may be read from a deposition at some other time, if appropriate under the regular rules.

MR. TOPKIS: Could we know, then, your Honor,

these things --

THE COURT: Just one moment, please.

I take it everything in here does have to do with 3M and only 3M.

MR. HRUSKA: Yes, your Honor, basically on the 3M incident. It may have some fallout areas.

THE COURT: I mean, it is being presented in relation to 3M.

MR. HRUSKA: Yes, your Honor.

MR. TOPKIS: First, your Honor, Mr. Arrow's name is on that list,as are a couple of other non-party names. Could your Honor indicate to us now whether you will entertain testimony, deposition testimony, from non-parties who do not meet the requirements for offering deposition testimony of non-parties?

THE COURT: If they don't meet the requirement, I don't see how I can.

MR. TOPKIS: My friend listed them perhaps under the theory that he could squeeze in under the exception to -- Rule 32, is it?

THE COURT: Remind me what the exception is.

MR. HRUSKA: I must say that I will confess to being really kind of confused as to what our ground rules are for reading from third party depositions. The

exceptions to Rule 32 are -- what is the word? -- exceptional circumstances.

MR. TOPKIS: I have it right here: "Upon application and notice that such exceptional circumstances exist as to make it desirable, in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court."

THE COURT: That makes it perfectly clear. What I mean is I don't see how I can possibly rule on this until I hear argument. I don't know if you are prepared to argue now as to what the circumstances are.

MR. HRUSKA: I would be prepared to say this, your Honor: This 3M incident --

THE COURT: I understand the importance of it.

MR. HRUSKA: -- is important to the case, and the question is how to present the 3M incident.

We are going to put Mr. Arrow on the stand. We would have been content to use his deposition. But because of the discussions we had before, we came away with the feeling that your Honor did not want that, you wanted the live witness, and that's what we are planning to do.

Mr. arrow --

THE COURT: Maybe it isn't, aside from the requirements of the Rule. But I think all of us who try

cases get a great deal more information and feel from a live witness than we do from a deposition.

MR. HRUSKA: I completely agree. The only reason I had suggested not using the live witness was because of the time pressure. So we are going to call Mr. Arrow. Mr. Arrow of course can cover a part, and a rather large part, of the 3M incident. He was the primary negotiator for 3M.

Now, there are other facts of that incident which Mr. Arrow cannot cover which come out of other depositions --

THE COURT: And what is the reason why we can't have those witnesses?

MR. HRUSKA: Well, we could. Again, it is a question of time. I mean, we spent a lot of time, for example, taking the deposition of Mr. Brettler.

THE COURT: Yes. But it doesn't seem to me -- after all, depositions can always be a lot longer than the actual testimony.

MR. TOPKIS: Oh, boy.

THE COURT: And, really, I suppose they ordinarily should be so that a careful lawyer can surround the situation.

It doesn't seem to me -- I'm just giving my

initial reaction -- that if you can read everything meaningful that a witness has to say in forty minutes, it is going to take six days -- that is an exaggeration, but an inordinate amount of time to get the same information out of him live when you have already deposed him. Of course, it will take longer; I understand that.

MR. HRUSKA: I think it will take a great deal longer, particularly with the nature of the witness. He is a man who rambles a great deal, and that was one of the problems with the deposition.

THE COURT: I'll think it over. Let me say this: Counsel should prepare themselves for the possibility of reading all the depositions. But, important as I understand the necessities of time, in this case as in every other case, I have to weigh those against two things: the value of a live witness to the Court, incidentally, from what defense counsel feel, and apparently the same feeling on the part of defense counsel, plus also I suppose the question of whether there is any cumulative testimony.

Is there any cumulative testimony?

MR. HRUSKA: I think probably some of it would be, a good deal of it would be.

THE COURT: If it is cumulative, I would then ask, to the extent that they can, and giving reasons why

they can't if they can't, that defense counsel stipulate that if X is called as a witness, Y and Z, like you did yesterday, would testify substantially the same, and then I don't know as we need a deposition or a witness.

MR. HRUSKA: May I briefly say this: I think the combination of all the depositions we've had on the subject plus the contemporaneous documents that have been produced really establish the point we want to establish. I could drop the whole idea of reading from these things and simply present them in post-trial papers and, I think, present them to the full extent that they would have to be presented.

THE COURT: How could you present them if they weren't in the record?

MR. HRUSKA: They would be in the record because we would introduce the documents, as we are planning to do anyway, and introduce the depositions.

THE COURT: The documents obviously can be introduced if you have a witness or somebody to introduce them. The depositions can't be introduced without conditions.

MR. HRUSKA: I am talking about party depositions, and additionally we could call, for example, one man, Mr. Goodman, who is not a party, and out of his deposition

there are about two pages that we thing are very useful to us and we could call Mr. Goodman to ask him the same questions. Perhaps we will do that.

But in terms of reading, the only reason that I had planned this reading was because I thought it was help-ul in terms of the continuity of the trial.

THE COURT: Let me ask you this: Are most of the 3M witnesses in this area or easily available in this area?

MR. TOPKIS: They are all here.

THE COURT: I don't necessarily mean New York City.

MR. TOPKIS: Yes, they are all here.

MISS KEARSE: I think most of them are from New York City.

Is that right?

MR. TOPKIS: All of them were available for testimony. We didn't depose any of them in Los Angeles.

THE COURT: All right. Let me consider it this evening. But I am inclined to favor hearing at least one live witness on each point that you want to make with regard to 3M. I don't see any point in hearing more than one live witness on each point you want to make, unless of course the experience of each one of these gentlemen or

women is significantly different, and if it takes a little while longer, since you allege -- I'm not criticizing you for doing it -- allege that this is pretty important episode --

MR. HRUSKA: There is no question about that.

THE COURT: -- then I think both defense counsel and the Court ought to be sure that they get a pretty good record on it.

MR. TOPKIS: Couldn't we know, your Honor, the order in which it is proposed to read them? Because that will enable us to do the fast job that your Honor is asking us to do.

THE COURT: Yes, I suppose you must know. You may have to revise it now, rethink it.

MR. HRUSKA: Yes. What we prepared last night was exactly the order, line by line, that we were going to read from the depositions.

MR. TOPKIS: That is hobbling around that.

MR. HRUSKA: Now you want to change that. I will give you the revised order when I get it prepared, which will be tonight.

THE COURT: It is only a quarter to four now. Can't you get back to your office and call him fairly soon?

MR. HRUSKA: Yes, I will do that.

MISS KEARSE: Your Honor, there is still no reason been given why the deposition of Mr. Arrow, who is not a party and who is here in New York, should be taken into evidence, and there are large chunks of his deposition which are listed here. If we knew that was not going to be --

THE COURT: If he is going to be called tomorrow, which you say he is --

MR. HRUSKA: Possibly tomorrow. Probably Thursday.

THE COURT: Is there any reason why you can't ask him questions live about the 3M either at the beginning or the end?

MR. HRUSKA: No reason whatever. I would be perfectly happy to do that.

THE COURT: See you in the morning.

(An adjournment was taken to Tuesday, May 9, 1973 at 10 a.m.)

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	829	25	"Is that how it's done"	"How is that done"
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	891	16	Retler	Brettler
	891	17	Plentier	Chaintia
	893a	2	whathe	what he
	894	10	do	did
	895	10	topublisher	to publisher
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May 8	902	23	arrow	Arrow
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.	69 CIVIL 5710

New York, May 9, 1973

STENOGRAPHER'S MINUTES

COLUMBIA BROADCASTING SYSTEM

vs. 69 Civ. 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

May 9, 1973
10:15 a.m.

(Discussion off the record in the robing room.)

(Trial resumed.)

(In the courtroom.)

A L B E R T B E R M A N, resumed.

MR. HRUSKA: Just a couple of loose ends from yesterday, your Honor, on exhibits.

THE COURT: All right.

MR. HRUSKA: We had offered the Harry Fox Agency brochure, PX-581, and unfortunately we had given Mr. Topkis an illegible copy.

Could I call upon the defendant's counsel to see whether they have any objections to that?

THE COURT: Are there any objections to 581?

MR. TOPKIS: No, your Honor.

MISS KEARSE: No, your Honor.

THE COURT: Received.

xxx (Exhibit PX-581 received in evidence.)

M.R HRUSKA: Through inadvertence on my part, I had

not actually offered PX-563 into evidence and that was the Harry Fox agreements with the Japanese licensing society and I would now like to offer that exhibit.

MR. TOPKIS: That I think I do object to, your Honor, on the ground or relevance,first. I don't really know what the --

THE COURT: What is the asserted relevance of the agreement?

MR. HRUSKA: Simply to show the form of the agreement between the Fox Agency and a foreign licensing agency, to give some concrete detail to the kind of relationship that Fox has with a foreign licensing organization.

THE COURT: Again, as part of a possible structure of a per use system here?

MR. HRUSKA: I think it goes, your Honor, to the question of market functioning in the sense of showing, as one small piece in an overall mosaic, of how suppliers of music, like a foreign licensing organization, and a piece of machinery, very elaborate piece of machinery, if you will, like the Harry Fox Agency, get together to insure that the product of the supplier becomes accessible to the user.

As I say, it is only a small piece in a much

larger --

THE COURT: I think the best way of handling things like this, really, is for me to accept it subject to a ruling on my own part that it's not relevant at a later time. In this kind of non-jury case and particularly in a complex case of this sort, I think it is sensible for the papers to be there for the Judge to look at. But I must admit at the present time, I have some doubt as to whether I think it will be relevant. It's a little hard for me to judge, really, on the basis of discussion, here.

MR. TOPKIS: I can't very well object to taking it for what it's worth. The difficulty is, your Honor, of course, as we are all aware, you wind up with a mountain taken for what it's worth.

THE COURT: Well, that's really my burden and I can look it over as we go along.

Why don't we leave it that I reserve decision, and I will look it over and tell you what I think.

MR. TOPKIS: Fine, your Honor.

THE COURT: What number is that?

MR. HRUSKA: 563.

The Court: If this is the original, I think it's better foryou people to keep the originals.

CONTINUED DIRECT EXAMINATION

BY MR. HRUSKA:

Q Could you take a look at Plaintiff's Exhibit 560 for identification and tell us what it is?

A This is the form of license used when issuing licenses to record manufacturers for the use of copyrights. It's the computer form, the new computer form.

THE COURT: Would you say that again?

THE WITNESS: It's a form of license by which we license record manufacturers to use copyrights on their records.

Q This is the mechanical rights license?

A Yes.

Q And it is the current form?

A Yes.

Q Used by the Harry Fox Agency?

A Yes.

MR. HRUSKA: I offer PX-560 into evidence.

MR. TOPKIS: No objection.

MISS KEARSE: No objection.

THE COURT: Received.

(Exhibit PX-560 received in evidence.)

MR. HRUSKA: There is something I should have asked yesterday.

Q Are you appearing here, Mr. Berman, pursuant to

subpoena?

A Yes.

THE COURT: I have quite a few -- talking about 560 -- quite a few of what appear to be duplicate pages.

Is that just a clerical error, or is there some reason for this?

Will you look it over, please, and let me know?

I see. They photocopied --

MISS KEARSE: May I ask how many pages there are?

THE COURT: That's what we are trying to figure out. There seem to be really only two pages, but in triplicate, if I get it correct.

Is that right, Mr. Berman?

THE WITNESS: I don't know, your Honor.

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THE COURT: Would you look at it and see? The photocopies seem to be in triplicate.

THE WITNESS: Yes, sir. It's a triplicate form.

THE COURT: Thank you. Now I understand.

Q We had left off yesterday, Mr. Berman, with a question and answer at pages 850 and 851 of the transcript. The question was:

"Do you know what the total annual dollar volume in the synchronization rights business handled by Fox is?"

MR. TOMKIS: For what? Television, motion picture or total?

MR. HRUSKA: In television synchronization.

Q And the answer you gave was:

"I would estimate it ranges between three-quarters of a million and a million dollars, closer to three-quarters of a million."

A Yes.

Q In the deposition you gave, at page 36, line 19 --

MISS KEARSE: Your Honor, may I ask that if Mr. Hruska intends to refresh the witness's recollection, he simply show the deposition to the witness and ask if that refreshes his recollection?

THE COURT: I think that's a better procedure.

MR. HRUSKA: Your Honor, I would submit that it won't make for a clear record.

THE COURT: Well, you are not impeaching Mr. Berman and, if you bring to my attention something he said at another time, there is a simple way of getting into evidence what he said on a deposition and, what is important, really, is what he says now, corrected by whatever refreshes his recollection.

You can refer to it and say, "Will you read lines so--and-so."

Q Could you read at page 36 the question beginning at line, I think that is, 20 (handing). I ask you --

THE COURT: Read it to yourself.

Q Read it to yourself and I ask you whether that refreshes your recollection.

A It does not refresh my memory. The reason for the difference in the figure I gave today or yesterday and the figure in my deposition is that I had occasion to take a closer look at the actual record and the figure I give you today is based on that, rather than the offhand estimate.

Q I see. You have records on this point?

A We have records as to income we take in, yes.

Q Do you also have records as to the expenses

of the operation in each licensing function?

A No, we do not.

Q Let me return to that later.

THE COURT: The figure that you talk of, then, is gross?

THE WITNESS: Gross, yes, your Honor.

Q This would be the gross total of all the licensing fees charged by publishers to television producers in the synchronization rights transactions handled by the Fox organization?

THE COURT: For television.

MR. HRUSKA: For television.

A Yes.

MR. HRUSKA: I simply, for the record, your Honor, would like to state our position that under the rules I believe we are entitled to read into the record portions of the deposition which are inconsistent with the witness's testimony.

THE COURT: Of your own witness's testimony, a non-hostile witness? Please don't do it now. You can call my --

MR. HRUSKA: No, because I dont think it's terribly important on this particular point but I think it may become important on other points.

THE COURT: Then we can discuss it out of court.

MR. HRUSKA: Mr. Fox, of course, is a representative of an organization --

THE WITNESS: Mr. Berman.

MR. HRUSKA: Excuse me. -- Mr. Berman is a representative of an organization which is run by music publishing companies.

THE COURT: I know. That isn't the definition. I mean, that doesn't mean that he is, per se, hostile and I found nothing in his behavior, responsiveness which indicates that he is, in the legal sense or even in any other sense.

I have a feeling you like us all. Is that right?

THE WITNESS: By all means.

MR. HRUSKA: I would simply say to that, your Honor, that I don't believe the reading of depositions with respect to a witness on direct examination depends on the hostility point.

THE COURT: I don't think it depends on that, primarily, either, except when you raise by implication the question, at least I thought you were raising it, that he might be hostile by pointing out that he was affiliated with publishers, I was responding.

Let's get on with the testimony. If you want to read from the deposition some time, just show me what authorities that you have.

MR. HRUSKA: All right, your Honor.

Q Could you tell us, Mr Berman, how many music publishing companies, during the course of the year, will issue television synchronization rights licenses through the Harry Fox organization.

A I don't know. We don't keep records as to how many specific publishers utilize our service for television purposes and, in view of everything, I would hesitate to even estimate it.

Q I show you your deposition at page 38. Would you please read lines 10 through 12.

Did you give an estimate during the course of your deposition on this point?

A Yes, I did.

Q Did you have reason to believe the estimate you gave at that time was correct?

A Yes.

Q Do you have reason to believe today that the estimate you gave at that time is incorrect?

A No. The estimate is still correct.

THE COURT: Then I assume that is another way of saying that does refresh your recollection.

THE WITNESS: That does refresh my memory, yes.

THE COURT: What was the estimate?

THE WITNESS: Several hundred.

Q What commission does the Harry Fox Agency charge music publishers on a television synchronization rights license?

A 10 per cent.

Q 10 per cent of the license fee?

A 10 per cent of the license fee.

THE COURT: That is paid by the publisher, right?

THE WITNESS: Yes.

Q Could you approximate how long it takes the Fox Agency to conclude a typical television synchronization rights license transaction?

A Of course it would vary with the type of show that was being licensed. An ordinary run-of-the-mill show doesnot takevery long. If it is a show that requires contacting the publisher abroad for his quotation, it could take several weeks. But normally it doesn't take more than several days.

THE COURT: We are talking about sync rights?

THE WITNESS: Television synchronizations.

Q You say several days for an ordinary run-of-the-mill show?

A Well, from the original quotation to the time that it is confirmed by the user to the time that we issue, actually physically issue, the license, it could take several days. It doesn't mean several days of intensive work, but over a period of several days.

Q How about the time from the first inquiry by the producer to the time there is a meeting of minds between the producer and the publisher or the Harry Fox Agency on behalf of thepublisher as to what the fee should be?

A Again, normally it shouldn't take more than a few

days at most. In most cases the television fees are fairly cut and dried and there isn't the type of back and forth negotiation you have with motion pictures.

Q I ask you, sir, to look at page 59 of your deposition and I think you can start reading at line 15 and read through the answer at the top of page 60 through line 3 (handing).

Perhaps I should point out the particular reference I would like to make is to lines 21 and 22 on page 59.

A Yes.

Q Now, do you recall having given an answer on this occasion?

MISS KEARSE: Your Honor, I object. If it is a question of refreshing the witness's recollection, the witness hasn't said he doesn't recall anything.

THE COURT: I don't remember Mr. Berman having recently said he didn't remember anything. Why don't you just ask him whatever you want to ask him and, if he doesn't remember, then --

MR. HRUSKA: The questioncame up in a slightly different way, your Honor, and -- shall I read the question? If I read the question, I don't think it would really key into -- well, let me just do it:

"Q How long does it take Mr. Finell to do his work?"

We were at that point in the deposition talking about Mr. Finell, who is in charge of the TV --

THE COURT: What is it you want to bring out now? What is the next question you want to ask this witness?

MR. HRUSKA: All right.

Q Does this testimony refresh your recollection regarding the time it takes in the usual, run-of-the-mill television sync rights licence?

MISS KEARSE: Objection.

THE COURT: Again, he hasn't said that his recollection was unrefreshed. He said --

MR. HRUSKA: Your Honor, he has given an answer today which differs from the answer he gave in the deposition. It is very difficult --

THE COURT: We are really in an awful quibble.

MR. HRUSKA: I really didn't have an opportunity to finish the last question. I was interrupted.

THE COURT: Go ahead and ask the question.

Q Mr. Berman, do you recall having given, at your deposition, an answer to this question of the length of time for the run-of-the-mill television sync rights transaction which differed from the answer you gave this morning?

MISS KEARSE: Objection.

THE COURT: Overruled.

A Yes. Having read the deposition, there is an inconsistency, but actually there isn't because the framework is different.

In the deposition I indicated it took minutes. Well, from the time a producer calls and asks for a quotation and somebody says "All right, it will be $50," it might only take minutes. But from the time it takes to do the transaction, from the time the quotation comes in, from the time the confirmation of the quotation comes in, from the time the license is issued, we have a period of several days. So it is a question of apples and oranges.

Q I see. Just to make it absolutely clear, in the run-of-the-mill television sync rights transaction a deal could be made, typically made, orally, verbally, on the telephone, within a matter of minutes, but the actual written confirmation and the preparation of the license could stretch it out for several more days?

A That's correct.

Q Perhaps I ought to ask at this point what the basic steps are in the television synchronization rights transaction, starting, I would take it, from the telephone call by a television producer.

A The basic steps are the request for a rate. This could come by telephone, it could come by correspondence

A quotation is given to the producer if we are aware of the guidelines indicated at some time by previous acceptance by the publisher.

If we don't know what a publisher wants to charge, the next step would be to call the publisher and give him the details of the use, arrive at a figure with him that he wants to quote, and convey that quotation to the producer.

At that particular point the producer generally will confirm the quotation to us by mail and there may be a period of several days or several months until he actually wants the physical license issued. Some producers play it very close to the vest and they want a clearance for a show that won't be on for several months. Others wait for the gun and they proceed from there. Those basically are the steps.

The license is then issued and it is sent to the producer, and he signs it, a copy is sent to the publisher, and then we wait for the money.

Q When you say the show won't be on for weeks or months, whatever reference you used, you mean that the tape or film of a program won't actually be broadcast or aired on a station or network?

A Not necessarily. Sometimes it won't even be filmed for several weeks or months.

Q How do you know that?

A I just know the operation. Some producers are very cautious. They want to know their costs because they have to work out a budget, and in some shows they want to know how much the music will cost before they proceed.

Q Would a special television special be an example of that?

A Yes, generally that is the kind.

Q You talked about a run-of-the-mill show. What would be an example of a show which was not run-of-the-mill?

A As you indicated: A special, a one-time show that is produced for television.

Q And television sync rights fees might be higher for such a special program?

A Yes.

Q What are the factors which influence the price of a television synchronization rights license?

A Well, the main factor, of course, is the publisher. He is the one who determines how much he wants for his song. Also, a very prime determination is the fact that the publisher wants the song used. And if he is anxious to get the song used on a program, this will tend to lower the price and make it more attractive.

Q Let me interrupt there, if I may. You say he wants

the song used.

A Yes.

Q Why does he want the song used?

A Well, number one, he wants to have the song in his show and obtain a fee, and also he wants it exposed so that he will earn a performing fee.

Q You mean distributions from his licensing society?

A Yes.

Q Could you continue on factors influencing price?

A Basically that's the main factor: The desire to get a maximum exposure of compositions for maximum income. We don't have the same elements entering into a television show that we have entering into a motion picture. The same quotation will be given for a full visual vocal as for a background instrumental. In other words, the use as on the program is not that important. The fact that it is used is important.

Q Could you tell us the price range of the television synchronization rights license?

THE COURT: I thought we have been through that. $50 to $150 except for the exceptions, and so on?

MR. HRUSKA: I'm sorry.

Q Did you say that yesterday, Mr. Berman?

A Yes.

MR. HRUSKA: I apologize.

THE COURT: Okay.

Q What takes a transaction out of this range into the higher range other than one factor already mentioned, and that is for a television special as opposed to a run-of-the-mill program?

A Well, of course, the next factor would be the utilization of a composition on television in a commercial context. If an advertiser wanted to use a song on television for commercial purposes, that, of course, would immediately take it out of the lower range and propel it right into the meaningful figures.

Q Any other factors which take the transaction out of the normal range and put it up into higher figures?

A Not that I can recall.

THE COURT: I suppose you have a few eccentric publishers who feel that their songs are worth more and as it?

THE WITNESS: That's basically it. There are some songs that are almost pinpointed as danger songs. We try to alert users that if they want it it will cost them a lot of money.

Q "Happy Birthday"?

A Among others.

MR. TOPKIS: Could we have some other examples than "Happy Birthday," just to liven it up?

Q Could you give us some other examples?

A There is a French publisher named Salabert who is extremely protective of all her compositions, and one of her main compositions where she controls the synchronizing rights is a song, "My Man." And as soon as we hear the word, "My Man," we tell the producer that this will cost you at least a thousand dollars, and she has gone as high as $5,000.

When Maurice Chevalier died, one of the networks, I don't recall which, wanted to replay a special they had done of Maurice Chevalier songs, and she controlled most of the copyrights, and there was a period of very frantic negotiations for several weeks, and she stuck to a price, and as I recall, it cost them $10,000 for this repeat run where originally it had cost them something in the neighborhood of $1,000. This is an example.

THE COURT: A very good one.

Q You mentioned television synchronization rights licenses for use of music in commercials, advertising commercials.

A Yes.

Q Are those licenses generally issued subject to

the broadcaster having a valid performing rights license from the applicable performing rights society?

A Yes.

Q Now, have you formed a judgment based on your experience about the kinds of music used on television, say television network?

THE COURT: I don't understand. Of course, the question isn't directed to me, but --

Q Are there certain basic categories of music, such as standards, show music, et cetera? Do you understand those?

A I understand. All types of music is used on television. You have country shows which will use country and western music; you have the Dean Martin Show, which many times specializes in standards; then you have some other shows that will use current pop tunes. There is no limitation.

Q But doesn't the bulk of it fall into what might be described as either standard works or well known tunes that have been around for awhile, or the very current pop hits?

A That would run the gamut of music. When you say standards, you have really two types of standards. You have the older standards and then you have the new

standards, the middle-of-the-road music, so to speak, that has become popular.

But it is very difficult to categorize the type of music used. I would hesitate to.

Q Now, does the Harry Fox Agency have any regular procedures for policing uses of music on the network television to make sure that nobody is infringing?

A No, except for the commercial uses, which is not that difficult in New York to police, and this is only done on an offhand basis. All my children are alerted to listen to commercials.

Q Is that a regular procedure?

A But that is only in New York City.

MR. TOPKIS: How many children does the witness have?

(Pause.)

A (Continuing) And they have, of course, come up with uses, and several uses which have not been cleared -- of course, are due to the ignorance on the part of the advertising agency.

But to answer your question more fully, outside of that very specialized area, we have no policing actually, except I am always alert, when watching television, to try to remember whether a particular show has been cleared.

That can't be considered very formal.

THE COURT: You don't have any arrangement with ASCAP or BMI to keep you informed of what they know about performances?

THE WITNESS: No, we don't.

Q Do your publishing company clients call infringements to your attention from time to time?

A Very rarely.

Q In your experience, are infringements a common phenomenon or a very rare phenomenon?

A It would be my estimate that certainly as far as the networks are concerned, it's a rare phenomenon.

Q Do you know, do you have any reason for knowing why that is?

A Well, because they have more knowledgeable people than the station, the independent stations in the hinterland.

Q The stakes are too high to fool around?

MISS KEARSE: Objection.

MR. TOPKIS: Could I have that back?

THE COURT: Sustained.

You can argue that but that isn't what he said.

MR. HRUSKA: I know, that's why I asked the question, your Honor, but I'll withdraw it.

THE COURT: Well, that was hardly a question. That

was a statement.

MR. HRUSKA: I thought I had figuratively put a question mark on it.

Q Apart from the knowledgeability of the people involved, can you think of any other reason, or do you know of any other reason why it is that infringements on television network broadcasts are a very rare occurrence?

A Well, let me say this -- since we have no formal policing system, I must say it's only my estimate that infringements are rare.

Q Can you think of any, by the way, offhand?

A No. I don't -- somehow the word "infringement" is a very harsh word.

Q Unlicensed or unauthorized use.

MR. TOPKIS: May the witness finish what he was going to say?

A There are, from time to time, I am sure, lapses where a show is on the air where there has been no clearance, in which case if we come across it, we would merely contact the people responsible and it would be handled without any rancor whatsoever.

Q Can you think of any instance of that in, say, the last five years?

A I frankly can't recall.

Q Assume, if you will, Mr. Berman, that your music publishing clients ask the Harry Fox Agency to take over the licensing of performance rights for network television. Could the agency do that?

A Well, as I indicated to you, we do what our publishers ask, but this would be such a very considerable job that I would certainly hesitate to answer without running some sort of study to find out what is involved, what the costs are, and all other facets, before I could give an answer.

When we do a job, we like to do it right, and we have to know what we are getting into.

Q The Fox Agency now has a full-time job in doing what you are doing, right?

A By all means.

THE COURT: May I ask you this -- would you explain to me what sorts of services you would have to perform in order to secure performing rights that differ from what you now do?

THE WITNESS: The volume, your Honor, because on television, when we clear shows, we only clear them when they are being shown for syndication or when they are being shown outside the United States or where they are being shown for the second time.

There are hundreds of shows that are on videotape or film that are shown for the first time on television where we don't become involved.

On a performing basis, all those things would become applicable.

Q Have you or has anybody, to your knowledge, at the Harry Fox Agency or the NMPA ever considered the Harry Fox Agency taking over the licensing of performance rights to television networks?

A Well, speaking for the Harry Fox Agency, I can tell you very definitely no.

I can't speak for the NMPA.

Q Right. But if anybody in the NMPA had come up with a plan for doing this, it would likely come to your attention?

A I assume, but I can't imagine why anybody would want to, out of a clear blue sky, come up with such an idea.

Q Why not, sir?

A Because there are organized performing rights societies who take care of that job.

Q ASCAP and BMI?

A ASCAP and BMI and SESAC.

Q If you were going to do this, might you have to quadruple your staff?

A It's very -- I don't know but certainly we would have to get a greatly augmented staff, greatly augmented physical facilities, et cetera.

Again, without a study as to just the volume involved, I couldn't give you any sort of answer but just from what I know about performing rights on television, it would be a very formidable job.

Q And you would have to train each new member of that staff, I take it.

A Yes. Or steal them from some place.

Q Excuse me?

A Or steal them from some place.

Q Even if you stole somebody from some place, you would have to train that person, wouldn't you?

A Yes.

THE COURT: There may be a lot of people available from ASCAP and BMI.

MR. HRUSKA: Well, I don't know that anybody would have the experience, your Honor, starting from scratch.

THE COURT: Okay.

Q Let me ask that of the witness.

Can you think of anybody that would have the experience in this, starting from scratch?

MR. TOPKIS: Experience in what?

MR. HRUSKA: In the licensing of direct --

THE COURT: To work at Fox on licensing of performing rights.

MR. HRUSKA: Right.

A Apparently, it would be a new venture and everybody would have to become familiar with techniques.

Q Mr. Berman, have you ever heard of the 3-M incident?

A Yes.

Q How did you learn of it?

A Probably by -- it happened a long time ago. Certainly, we just learned about it by various publishers calling and saying, "What do you think about this?" And this is how it would come to our attention.

Q And some of the publishers who called you did not approve of music publishers licensing 3-M directly?

MR. TOPKIS: I object.

THE COURT: Sustained.

Q Did any of the music publishers who called you with respect to the 3-M matter indicate to you their disapproval of licensing 3-M directly?

MR. TOPKIS: I object.

THE COURT: I don't see how I can take the testimony, whatever he says; it's hearsay, isn't it? They are not

parties.

Well, if you are talking about parties, that's another matter.

MR. HRUSKA: Well, I think, your Honor, that first of all we know and other evidence will indicate precisely the identity of the publishers who did not deal with 3-M.

Number two --

THE COURT: Let me say, I think that I can take the answer to this question if, number one, the persons with whom he talked were parties or members of a class, I suppose, and maybe they are, and, second, if you ask him what they said, instead of suggesting to him the answer --

MR. HRUSKA: Excuse me?

THE COURT: Secondly, if you ask him what they said, rather than suggesting the answers.

MR. HRUSKA: Right.

MR. TOPKIS: If I may, your Honor, so far as a party is concerned, if the witness were first asked, "Did you ever have a conversation with a named party," I would not object to that. But so far as a class if concerned, I know of no way that I can cross-examine a class, and this will strip me of any opportunity to.

THE COURT: I am not saying cross-examine the class. You are entitled to an identification of the person.

MR. TOPKIS: Okay.

THE COURT: All I am saying is that I don't know, I never had the question and I don't think anybody else has either, what the application of the hearsay rule is to a person who is identified and is a member of the class, although not a named defendant.

I think it would be the same rule as would apply to a named defendant.

MR. TOPKIS: It may be but I take it we are in accord that we will proceed on a name by name basis?

THE COURT: Yes.

MR. HRUSKA: May I also state, your Honor, I think that a very fundamental issue in this case, which I believe has really been made an issue by the defendants, is the state of mind of the ASCAP and BMI memberships on this particular point.

THE COURT: Well, that may be. That's not in conflict with what I have just ordered.

In other words, find out, let's be precise about it.

MR. HRUSKA: Yes.

THE COURT: You can ask questions about who the conversations were with and when you get a name, you can ask what those people said.

Q Do you remember the names of the publishers with whom you had these conversations?

THE COURT: Or any of them.

A I don't. And I really can't categorize them as conversations.

Obviously, being in the midst of the music clearance field, I was aware of it but as to how I became aware of it or whether any specific publisher brought it to my attention, I really can't say truthfully.

The fact is, I am sure that several publishers must have spoken to me but we are talking about a period that is, what, at least eight years old, eight by this time.

THE COURT: Did you ever have any formal meetings or discussions with anyone?

THE WITNESS: No, your Honor.

A (Continuing) I really just admit to being aware of the situation, but certainly not from any specific source.

Q The publishers that you spoke to, though, would have been some of the major publishers?

MISS KEARSE: Objection.

Q True?

THE COURT: That doesn't make it a non-leading question.

MR. TOPKIS: Objection to that.

THE COURT: I would prefer thatyou say, were the publishers major or minor, if you can recall?

A Since I don't recall, I really can't say whether they were major or minor. I would say that, you know, it could be a combination of both.

Q What is the probability here, Mr. Berman?

A Well, the probability is that they would be the major publishers, yes.

Q Could you state the substance of what those major publishers said to you on the subject of licensing 3-M directly?

MR. TOPKIS: Objection.

THE COURT: I'll have to sustain the objection because I think it's absolutely impossible for the defense counsel to do anything about such a statement of the substance of conversation attributed to several anonymous publishers. I don't see how they can possible counter it.

MR. HRUSKA: May I be heard for a moment?

THE COURT: Surely.

MR. HRUSKA: There aren't that many major publishers, No. 1.

No. 2, we would submit to your Honor that the fact that any major publishing company in the United States, and particularly the fact that several major publishing companies in the United States, felt sufficiently strongly on the subject of the 3M Act, that is, licensing 3M directly, as to have expressed those views to Mr. Berman in the terms that they expressed them, as Mr. Berman testified in his deposition, is a fact of some considerable relevance to this lawsuit.

MISS KEARSE: Your Honor, I move to strike Mr. Hruska's remarks.

THE COURT: Well, I can't take them as evidence. I don't take them as evidence.

I don't see how that obviates the basis of my ruling. I am not saying that it is not significant, if it could be attributed to somebody particular.

MR. HRUSKA: My point is, it doesn't have to be attributed to a named person, as long as it is attributed to several major publishers, which it has just been attributed to, and that's our position.

MR. TOPKIS: As long as the rule about con-

frontation of witnesses continues --

THE COURT: I gather that you will be calling people as witnesses on this subject, anyway, and I don't see why it's going to be difficult for me to conclude, if they testify in the flavor of what has been brought to my attention up to now, that there were, indeed, some people who objected to this thing very strongly.

The conclusions to be drawn from that may be different. I am not even sure whether the defendants necessarily disagree.

MR. HRUSKA: The reasons for the objection --

MR. TOPKIS: Your Honor, that's the very problem with the kind of statements that we have been hearing here in this courtroom. There was no great public outcry. There weren't --

THE COURT: I didn't say that there was a great public outcry. I didn't say I was even led to believe that.

I said that I was led to believe by the documentation, and so forth, up to this point that there were some publishers who strongly objected to the concept.

MR. TOPKIS: A few publishers would be an accurate statement.

THE COURT: Well, I think that is quibbling.

In any event, Mr. Hruska, I am adhering to my

ruling.

MR. HRUSKA: May I make, then, an offer of proof, your Honor?

THE COURT: Yes.

MR. HRUSKA: That if the witness were to have answered the question, he would have --

THE COURT: No. I don't see any point in that, because I understand that it might be very useful to you. That isn't the rock on which I am stubbing my toe. It's not a statement attributable with sufficient accuracy for me to think it ought to be admitted.

MR. HRUSKA: The offer of proof would be not only as to the fact that the publishers disapproved but the reasons that they disapproved.

THE COURT: Well, the ruling is the same.

Q. During the course of your experience, Mr. Berman, have there been new developments involving new uses of music which call for new types of licenses?

A Yes.

Q Could you name a few?

A The long playing record probably was the most innovative. Then, of course, the advent of the filmed television show and, currently, we have the video cartridge that is a subject of licensing discussions.

THE COURT: What about casettes? Do they make any difference? I mean, do you have a special arrangement?

THE WITNESS: What I said, a video cartridge -- there are two types of casettes, the audio casette --

THE COURT: Audio?

THE WITNESS: No. This is the normal type of license.

THE COURT: The same as records?

THE WITNESS: Yes.

Q What about cable television?

A We haven't become invelved in that at all.

Q Isn't it true that cable television companies right here in New York, for example, originate programs?

A I don't know.

THE COURT: That's a big question, isn't it? I mean, is it not a question that has been litigated to some extent?

MR. HRUSKA: Well, there was the Tele-Prompter case but there wasn't a question there of origination. The question there was whether they ought to pay for originating programs.

Q Have you ever had any discussions with anybody in this music business on the subject of whether or not cable TV companies should have licenses for the use of

music on the programs that they originate?

MR. TOPKIS: Your Honor, objection. I see no relevance.

THE COURT: What is the significance of it?

MR. HRUSKA: If the witness could be excused, your Honor, I would state it.

THE COURT: Mr. Berman, could I ask you to step outside for a moment?

(The witness left the courtroom.)

MR. HRUSKA: We have reason to believe, your Honor, that there is an understanding amongst music publishers and the licensing societies not to pursue the cable television companies for infringement.

Now, the significance of that in our mind is that in order for this understanding to be implemented, it must be adhered to by every major, certainly, music publishing company in the United States because, otherwise, any one company could jump off with that and bring a lawsuit.

So, some understanding must have been arrived at.

This would be part of some additional proof in other areas that we would proffer to the Court to show the propensity of the music publishing business to group together against any common threat.

The reason, we believe, that such unusual action is being exhibited by music publishers in not going after the cable coverage does involve some other complicated economic facts.

I think that basically what it comes down to is the belief by the publishing industry that it would be better not to issue a license now to these cable people but to allow them to develop more and then come in at a subsequent period of time at a rate which is higher than the rate that they would get if they were to start off at a very low rate at this point.

THE COURT: I am sure that your suggestion is going to meet with a little opposition, but let me hear it.

MR. TOPKIS: The basic problem, your Honor, is that that is an entirely different lawsuit and the idea of trying out the issue of whether all publishers are part of an agreement, conspiracy, if I should use the dirty word, not to deal or not to license CATV, we would be trying that issue for a long, long time, and I am not retained for that assignment.

I just have heard strange suggestions in this courtroom, but that, up to now, is the strangest.

MR. HRUSKA: I don't plan to try it for a long time, but --

THE COURT: I don't need to hear from Miss Kearse, although I am sure she has something useful to add.

I sustain the objection. I think it goes outside the confines of this very large lawsuit.

(The witness resumed the stand.)

BY MR. HRUSKA:

Q I believe you told us yesterday about some types of phonograph record uses of music which frequently were billed at a below two cents rate, on which the mechanical rights issued was issued at a below two cents rate?

A Yes.

Q Have you ever had any discussion with any publishers or group of publishers regarding price that any other publisher had charged for a mechanical rights license, a below two cents price?

MR. TOPKIS: I will not object to a yes or no answer to that question but I don't want any more than that.

THE COURT: Do you want the question read back?

THE WITNESS: I understand the question.

A The answer is, I never discuss, with other publishers, the prices charged by individual publishers.

We represent each publisher on an individual basis and each publisher makes his own determination as to what he wants to charge.

Q Have you ever talked to a publisher who had issued a particularly low mechanical fee, issued a mechanical rights license with a particularly low fee, about the fee that he issued or charged?

A Again, we issue thousands of licenses a year. It is very likely that I might, at some time, have indicated to a publisher that the fee he charged was unusually low, but it really makes very little difference to the agency as to what the publisher charges.

If he wants to give his material away, that's his option and we just take his instructions.

Haven't you indicated to a publisher who gave a particularly low price that he was out of line?

MR. TOPKIS: Objection, your Honor. This sounds like we are going into still another lawsuit.

THE COURT: I don't know if that is still another lawsuit or not. It sounds like cross-examination to me, on this particular question.

I will sustain the objection on that ground. You can ask if he ever has.

Q Have you ever stated to another music publisher that the price that that publisher was willing to quote on a mechanical rights fee was out of line?

THE COURT: Do you mean those words literally?

"out of line"?

MR. HRUSKA: In substance. No, your Honor, not necessarily those precise words.

A I must have. I am in the middle of licensing all year-round. We represent publishers and that means that we should take care of their interests.

Some publishers are complete novices in licensing. They may give a license based upon incorrect or half-correct information given to them by the user and, based upon that information, they may give a reduced price license.

It is very likely that I would tell a publisher that -- not that he has been had but that the next time he should ask questions.

Q And tell him that it was bad for the industry for him to issue such a low price?

A I never --

MISS KEARSE: Objection.

THE COURT: Overruled.

A I never tell anyone it is bad for the industry. It may be bad for a publisher, because the copyright is all he has to sell. As far as industry practice, it really makes no difference to the industry what he charges.

Q Have you ever had any conversations with Mr. Salvatore Chiantia regarding a below two cents price that had been offered by another publisher?

A No, not that I can recall.

Q Have you ever had any such discussions at a meeting of the NMPA?

A I don't attend meetings of the NMPA.

Q Ever?

A I attend occasionally when I'm called in, when they ask about the progress of some project the agency is involved in. But we never discuss this topic, we have never discussed that topick, at any meeting of the NMPA. The lawyers would throw us out.

Q Have you ever discussed such a topic with any members of the board of the NMPA?

A On an individual basis?

Q Yes.

A I certainly have.

Q About low prices being offered by some other publisher?

A No.

Q About what?

A About the general -- about their specific situation. Again, in this particular field you have the herd

instinct, of course. But as far as specifically talking to one publisher about what another publisher charges, I can't say that I never spoke to anyone. Obviously that would be incorrect. But as to any routine practice outside of an offhand comment, the answer has got to be no.

Q Mr. Berman, have you ever spoken to any publisher on this subject at the instance or request of other publishers?

A Again, "have you ever" is a long time. The answer -- I can't recall any specific instance where one publisher has asked me to speak to another publisher about a rate that he charged.

Q Or suggested such a conversation?

A The answer has got to be no. I can't recall any specific one.

Q Mr. Chiantia has never made that suggestion to you?

A No, he never made.

Q Mr. Bretller?

MR. TOPKIS: Your Honor, what's this got to do with anything in this case?

THE COURT: I assume that Mr. Hruska will attempt to connect it with concerted activity on the part of the publishers. Whether it will show up to be the kind of concerted activity that is relevant to this case, I haven't

yet decided. But I think it is close enough to allow it.

Q Have you ever had this discussion with Mr. Bretller in which he may have suggested to you that you talked to some other music publisher who was quoting lower prices?

A I don't recall any such conversation.

Q Mr. Shulman or Mr. Shayne?

A I don't recall such conversations.

Q And is it your testimony, sir, that in each case in which you talked to a publisher who had offered a low price, you hadn't previously talked to any other publisher about your conversation with the price-cutting publisher?

MR. TOPKIS: I object to that.

THE COURT: I think it is a very confusing question.

Isn't your testimony that in such conversations as you did have with a publisher about his prices, these were independent and prompted by yourself and by no other people?

THE WITNESS: Yes, your Hon.

Q You used the term before, Mr. Berman, "herd instinct." Could you tell us what you meant by that?

A Well, the herd instinct generally is the feeling not -- the herd instinct is so that publishers know what

they are being asked to give.

THE COURT: Do you mean by "herd instinct" that there is an instinct among publishers to act in a patterned way, I mean to look for guidelines?

THE WITNESS: Yes, your Honor, yes.

Q And perhaps to join together against common threats to the publishing industry?

MR. TOPKIS: Objection.

MISS KEARSE: Objection.

THE COURT: I'll sustain the objection because I'm not even sure that as unique and experienced a person as Mr. Berman is qualified to answer that question.

Q Have you ever witnessed any examples of music publishers banding together against common threats, joining ranks against common threats?

MR. TOPKIS: Objection, your Honor.

THE COURT: If he's witnessed it, that is something else. I don't know what he means. Maybe he was at some meeting or something like that.

MR. TOPKIS: That is what I'm looking for. My objection is as to the form of the question. If he once saw them in a phalanx with spears, I would agree that that would probably be an instance.

THE COURT: Have you ever seen or heard --

MR. HRUSKA: I'll take that.

MR. TOPKIS: I'll let you take it.

THE COURT: Instead of the witness witnessed, let's say "seen or heard."

Have you ever seen or heard any -- any what?

MR. HRUSKA: Examples of publishers joining ranks against a common threat.

A Yes. In the negotiation for the new copyright bill, the publishers joined to -- I wouldn't say against a common threat, but they joined to legislate in their own interests. And in trade association matters, where a postal bill might be offered that would be contrary to their interests, they would join together.

There was a -- CBS was faced some time ago with some threat against the negative option and the publishers helped CBS in combatting that threat.

So the answer has got to be yes.

Q I am afraid I don't know what a negative option is.

A A negative option is when the Columbia Record Club says, "Unless you mail this card back in twenty days you'll get a record," that's a negative option.

THE COURT: The Book of the Month Club?

THE WITNESS: The Book of the Month Club type of

thing.

And for awhile I think it was the FTC wanted an affirmative option. If you want the record, write a letter, put a stamp on the envelope and tell them you want the record, which would be very injurious --

Q Do you remember any instance in which the publishers joined ranks against a broadcaster or any group of broadcasters?

A No.

Q Are you familiar with the Shenendoah Program?

A No.

Q I would like to show you a portion of Miss Mingle's deposition at Page 58 --

THE COURT: For what purpose?

MR. HRUSKA: To refresh his recollection on a subject in which his own testimony was somewhat different, regarding kinds of records kept by the Harry Fox Agency. The main purpose here, your Honor, is that we served a subpoena duces tecum on Mr. Berman -- perhaps I should ask him first.

Q Mr. Berman, have you brought any documents with you in response to that subpoena duces tecum?

A Yes.

Q Since you had not told me about it, I assumed

you hadn't. I'm sorry, sir.

A Well --

THE COURT: Go ahead. What were you going to say?

A I am aware of what you are bringing up, something that came up in the deposition where Miss Mingle said some records were available and I said they were not.

Q Right.

A My answer is still the same. They are not.

THE COURT: Have you made a search for them?

THE WITNESS: Yes.

Q There are no revenue or cost records which indicate the revenue and cost of the part of the Harry Fox Agency which deals in (1) television rights, (2) movie rights --

THE COURT: You mean breaks them down?

MR. HRUSKA: Right.

Q -- and (3) mechanical?

A That is exactly correct. We were not a statistically oriented outfit and we don't have time for these frills.. We get bills and we pay them. We really don't care where they come from.

THE COURT: You didn't know that CBS was going to sue ASCAP and might want this information?

Q Miss Mingle was just wrong?

A Yes, Miss Mingle was wrong.

Q One other thing. Miss Mingle testified yesterday that the Fox commission in the movie rights deal consists of two parts really: Ten per cent of the world-wide synchronization rights fee and five per cent of the United States performance rights fee.

A That is correct.

Q That is correct. Now, that transaction, movie rights transaction, is typically one license with these two parts.

A Yes.

Q And isn't it typically negotiated on an overall fee basis? In other words, where an agreement will be made where the fee is, say, $750, without any particularization at that time as to how you are going to split the $750 between sync and performance?

A I don't know. This is Miss Mingle's domain exactly and I --

THE COURT: Youare getting me confused. The ten per cent and five per cent, that's your charge, is it not?

THE WITNESS: Yes.

MR. HRUSKA: Yes.

THE COURT: And the $750, are you talking about the Fox charge to the producer?

MR. HRUSKA: To the producer, yes.

THE COURT: They are two different things?

MR. HRUSKA: That is right. What confuses me, and maybe I can state it this way, is, since there are two different commission rates that have to be paid by the publisher --

THE COURT: How do they figure which is which?

MR. HRUSKA: Right. How do they allocate the fee charged to the producer as between the ten per cent side and the five per cent side? I mean obviously it would be to their advantage to allocate everything to the five per cent side.

THE COURT: If we can get a quick answer to that, all right.

Q Can you explain that?

A I can give you a quick answer. The fee is given in two parts. There is one fee for the world synchronizing rights and there is another fee for the performing right.

I would assume at the time Miss Mingle negotiates with the publisher, she asks them for a quotation for world synchronizing and for U.S.performing.

I should make one correction on the fee structure. I don't know whether Miss Mingle brought it up. There is a ceiling. It is ten per cent on world synchronizing,

but there is a ceiling of $150.

THE COURT: She did bring that up.

Q She did bring that up, yes.

Let me make one more stab at it, Mr. Berman, because I am still confused about this.

Would you agree that the producer obviously does not care, if he has got to pay a thousand dollars, how the publisher splits that thousand as between sync and performance? Is there any reason for him to care?

A There is no reason for him to care, no.

Q But there is a reason for the publisher to care?

A Not really.

Q Wouldn't he rather put all the money in the --

THE COURT: May I intervene to say I think this is intellectually kind of intriguing, but what really does it have to do with our case?

MR. HRUSKA: Well, we want to understand, your Honor, as much as we can about the limits, obviously, about the cost of the Fox operation, and it is a little hard to understand this movie --

THE COURT: Of course I want to have some feel of the costs of their operation. I mean it would make a difference if the cost of their operation was one per cent of the total value of the property or forty per cent. But

these little refinements really don't seem to me to have any significance. I am sure there is some way -- I thought Mr. Berman just said that Miss Mingle does nail it down one way or another before the deal is consummated.

Is that right?

THE WITNESS: That is correct, your Honor.

Q Is it typical that they just split the fee in half and assign half to the sync rights and half to the performance rights?

A Yes.

MR. HRUSKA: I have no further questions.

THE COURT: All right. Let's take a recess at this time.

MR. HRUSKA: I'm sorry, your Honor. I must be slipping. I did not get a chance to take the document from Mr. Berman and take a look at it.

THE COURT: Let's still take the recess now.

(Recess.)

THE COURT: All right.

(Plaintiff's Exhibit 863 marked for identification.)

THE COURT: State for the record what it is, please.

MR. HRUSKA: I will have the witness do that, your Honor.

BY MR. HRUSKA:

Q Could you state for the record what this is (indicating)?

A This is a breakdown of the income derived by the Harry Fox Agency for the period from 1968 through 1972 for the various areas that it covers, specifically, mechanical, television synchronization, motion picture synchronization, and electrical transcription.

Q That motion picture synchronization column -- the precise heading is "Synchronization" -- does that include the Fox commissions on the performance rights side of the movie transaction?

A Yes, it does.

THE COURT: That's under motion pictures; is that right?

MR. HRUSKA: All it says at the top is "Synchroni-ation."

THE COURT: It relates to motion pictures?

THE WITNESS: Yes.

Q It means theatrical motion picture synchronization and performance rights, license commissions?

A Yes.

Q Electrical transcription refers to the wired music area?

A Yes.

Q These are dollars (indicating)?

A These are dollars.

MR. HRUSKA: I will offer that in evidence, your Honor.

MR. TOPKIS: It is all right with us, your Honor.

I might suggest, because often exhibits and transcript get separated, that Mr. Hruska and Miss Kearse and I might agree on a revised form which might incorporate in the headings the information Mr. Hruska elicited from the witness.

THE COURT: There is no objection to its admission?

MR. TOPKIS: No, your Honor.

MISS KEARSE: No, your Honor.

(Plaintiff's Exhibit 863 received in evidence.)

xx

THE COURT: The 1972 figures for mechanical transcription is blank. I take it it was not available?

THE WITNESS: It was available. We received no income in 1972. It is a dying field.

THE COURT: Thank you.

BY MR. HRUSKA:

Q Those figures come from the business records of the Harry Fox Agency?

A They do.

Q Can you identify the titles or descriptions of the documents from which that chart was compiled?

THE COURT: Since nobody --

MR. TOPKIS: Are you undercutting it?

MR. HRUSKA: No. I want to get an idea of the files from which it came.

THE COURT: So I gather, but why?

MR. HRUSKA: Perhaps in an overabundance of caution at some later point we might find information that does conflict with that. I don't know, your Honor. While Mr. Berman is here --

THE COURT: He is here and let's get it over with. I think that time is a problem. I hate to keep going into all these little side alleys.

A It comes from the certified statement submitted

by the accountants on a yearly basis.

Q One more question, please:

Does Mr. Finell check with you from time to time regarding the issuance of television synchronization rights licenses?

A Yes.

Q And the purpose of that --

A I am more knowledgeable about the field than he is.

MR. HRUSKA: I have no further questions.

THE COURT: Mr. Topkis, you may proceed.

MR. TOPKIS: Yes, your Honor.

CROSS EXAMINATION

BY MR. TOPKIS:

Q Mr. Berman, when the producer of a television variety show calls you and wants quotes for TV synchronization rights for songs he proposes to use on that variety show, does he ask you for quotes from all of the songs at once typically and, indeed, for some possible substitutes?

THE COURT: All the songs he might use on the show?

MR. TOPKIS: Yes, your Honor.

A Generally that's his procedure.

Q Typically you are giving quotes on more than the

number of songs that ultimately show up?

A Yes.

Q You give them to him all at once and he picks and chooses?

A As much as possible.

Q When you get quotes for television synchronization use from publishers or have them in your heads or records -- you and Finell being the two heads -- and offer those quotes to a producer, for how long are those quotes good?

A The general understanding is that they are good for a 30-day period.

THE COURT: It would seem to me yesterday that you spoke about a 90-day period. What did you mean by that?

THE WITNESS: The motion picture license is much more precise than television.

THE COURT: Thank you.

BY MR. TOPKIS:

Q Mr. Berman, have there been occasions where a television producer has sought from the Harry Fox Agency quotations for TV synchronization rights on compositions already incorporated in taped or filmed programs?

A Yes.

Q Does that happen frequently, rarely, or could you give us an indication?

A Well, I mention that the first time network reruns are normally licensed at the rate of $25 per composition, in virtually all cases those shows have already been filmed and conceivably a publisher could charge whatever he wants to. But, to answer your question, we do give quotations in some cases after the fact.

Q Although, as you just said, the publisher could charge anything he wants to, what has been your experience as to what the publishers have charged?

A My experience has been that the publisher has always charged the normal rate he would have charged in the first place.

Q Now, sir, according to that exhibit that was just received in evidence -- the number of it escapes me -- 363, your income from television synchronization rights in recent years has been running about three-quarters of a million dollars?

A Yes.

Q You have told us that compositions are licensed at $50 to $150 typically, but occasionally the figure can go far higher than that?

A Yes.

Q Could you, on the basis of arithmetic, give us an indication of how many thousands of compositions you

are licensing annually for TV synchronization rights?

A It would have to be a very crude attempt because we make no attempt, as I indicated before, to have any statistics or count the transactions.

On the basis of the normal price -- when I say "normal price," on the basis of an average price of $150, and on the basis of the receipts, I think we are talking about specific instances of some wide variation of 3000 to 5000 songs per year.

Q And that covers licenses for shows appearing on all three national networks?

A It covers all licenses for the networks as well as independant syndicators.

THE COURT: Of course you might give a license for the same song more than once during the year?

THE WITNESS: Oh, many times, your Honor.

Q Included in that title, are there licenses for shows that are never performed on networks but which are performed on local television?

A Yes.

Q And are there licenses for TV commercials embodying music which are performed on local television rahter than on network television?

A Yes.

Q So that the total number of licenses for network television use would be somewhat lower than the number of thousands that you mentioned a minute ago?

A Yes.

Q Could you estimate for us with any degree of accuracy what the total number of compositions you have licensed annually for network use is, then?

A No, I couldn't.

Q You testified, Mr. Berman, that you know, as to

many publishers, what their prices are for TV sync rights.

A Yes.

Q And you mentioned a Madame Salabert, was it, in relation to "My Man"?

A Madame Salabert, yes.

Q Are there other publishers who have their idiosyncratic pricing activities?

A Yes, there are.

Q Do publishers sometimes change their quotes depending on the kind of use that will be made of the composition?

A Yes.

Q Are there any nationally known publishers who want information on the kind of use that will be made before they quote a price?

A Generally we are aware of their price pattern. But if we get a request for the use of a song that has an inordinate type of use, normally as I indicated it makes very little difference whether it is a visual vocal or just a short background instrumental, but if it's a song that is used time and time again throughout that particular show, the publishers want to know about it, and in that case he would certainly charge a higher fee.

Q I have heard it suggested that Mr. Irving Berlin

into unusual detail in seeking information as to the uses of his compositions. If my information accurate, according to your understanding?

A No. Basically I don't think so. The compositions owned by Irving Berlin Music Corporation are available on a competitive rate. He is very particular, of course, about the use of his compositions on a commercial basis.

Q I see.

A When someone wants to use it in advertising. But if it's a normal use, he acts normally.

THE COURT: You mean he refuses to grant it on some matters of taste, or are you talking about price or what?

THE WITNESS: On commercial uses it is a matter of taste. There are some songs that he doesn't want used at all in a commercial context. Generally --

THE COURT: I guess he would not want "God Bless America" to be used for American Airlines or something like that.

MR. TOPKIS: You've got an idea there.

(Pause.)

Q Do publishers typically charge the same price for all their compositions or do they distinguish, charging $50 for one, $100 for another, $150 for a third, but by

group?

A Generally they don't distinguish.

Q Are there any who do?

A Again, the individual song -- I know that there is one publisher who has a song, "High Noon," who always wants to know the details of the use because -- for whatever reason he has. But except for an exceptional song here or there, basically they don't differentiate between compositions.

Q In mentioning the factors which influence the price that a publisher will ask for a TV sync right, you mentioned his desire to see his song performed, to get the synchronization fee, to get a performing rights distribution from ASCAP or BMI.

In your experience, is there an additional factor shpaing publishers' negotiating positions or prices quoted, and that is, I suggest, the desire of a publisher to have his song on television as a means of stimulating record sales?

MR. HRUSKA: I object to the question, your Honor. I would suggest that the question be limited in the first instance, if any question in this area is appropriately addressed to the witness, to whether publishers have stated this to Mr. Berman, number one. I don't believe

Mr. Berman's expertise in the subject of the question has been sufficiently established, if established at all, to enable him to give an opinion in this area.

THE COURT: I'll allow you to clarify anything on redirect, but I think it is an artificial barrier. I don't know what Mr. Berman's answer is going to be or whether he can give you one, but I'll allow it if he can.

A My answer will be that any publisher always wants a song exposed, and once a song is exposed, one never knows what happens.

Q And the exposure is desired for an economic advantage?

A Yes.

Q Mr. Berman, you were asked by Mr. Hruska on direct something about suppose publishers ask you to take over licensing of public performances on network television. Do you remember that question?

A Yes.

Q And as I understood it, you said that you wanted to make a study before giving a detailed answer.

A Yes.

Q Let me ask you this, sir: Would the task be significantly different from the task you now have when licensing TV sync rights?

A Only in numbers. It is certainly much more formidable merely because the uses would be so much greater. But the job could be done, I assume, with enough people and enough physical equipment.

Q Do I understand that the number of compositions that would have to be cleared would be greater because there are many compositions today broadcast on network television as to which synchronization rights for one reason or another are not cleared?

A I would say certainly there are more that are not cleared than are cleared at the present time.

Q And that comes about by reason, I suppose, of live performance?

A Yes; two reasons. First of all, we haven't become involved in live performances. But if live performances have to be cleared, this would be a very substantial area.

The second area would be on shows that are on film but are at the present time not repeated. If a show is on film for the first time and not repeated, generally there is no license required, and tyis would be another area where clearance would be required for performing purposes.

Q All right. But given enough people and enough money, you think you could probably do the job.

A Yes.

Q You say that today there are programs where the synchronization rights are not obtained where syndication is not expected.

A Yes.

Q That is to say, these are programs that are originally conceived to be for one time use on national television, right?

A Yes.

Q It often happens, I take it, that those programs,

having been recorded by videotape or something like that, whatever mechanical technique or electronic technique, actually are subsequently rebroadcast, is that right?

A Yes.

Q Is that a commonplace in the industry?

A Fairly common, yes.

Q Now, in that situation typically, do the publishers, when you approach them then for synch rights license quotes, quote the same rights that they would have quoted initially?

MR. HRUSKA: I object. I don't know how the witness can answer that question. I don't know if there is any foundation laid.

THE COURT: I think he has the competence to answer it. Whether he can answer it is another matter.

When you say "would have originally," let's assume, for example, a period of two years have passed. Are you talking about what they would have charged two years ago or what they would have charged today for the same thing?

MR. TOPKIS: What they charge today for the same thing.

THE COURT: That I think he can answer.

A Again, we fall into that category of one time

network repeats, where the general practice is to charge $25 for that one time network repeat on that date only. In that case it is fairly cut and dried, where they would just charge $25.

THE COURT: So, in other words, the answer is that he would do the same thing even if there had been no previous issuance of synch. rights --

THE WITNESS: Yes.

THE COURT: -- as if they were being asked for just today in the first instance.

THE WITNESS: Yes, your Honor.

Q And how about the situation where the synch. right is designed for syndication use?

A Generally publishers quote the same fee. They rarely quote on a punitive basis.

MR. TOPKIS: I think, Mr. Berman, that concludes my questioning. Thank you, sir.

THE COURT: Miss Kearse?

MISS KEARSE: Your Honor, may I have just one moment?

THE COURT: Certainly.

(Pause)

MISS KEARSE: I have no questions, your Honor.

MR. HRUSKA: I have a few questions, your Honor,

on redirect.

REDIRECT EXAMINATION

BY MR. HRUSKA:

Q Mr. Berman, do you know whether television producers clear synch. rights before or after their programs are taped or filmed?

A I would assume generally they clear before they are filmed or taped.

Q Would you know if a television producer cleared the synch. rights after the program was taped or filmed but before it is broadcast?

THE COURT: You mean would that information come to his attention in the normal course of events?

MR. HRUSKA: Yes, right.

A Generally it would not.

Q So, when a television producer calls you up, or his agent calls you up or calls Mr. Finell, your agency, and asks for a quotation on a synch. right and the program hasn't been braodcast yet, you would have no idea as to whether or not that program has been filmed or taped.

A Generally, no.

Q But your assumption would be that it hasn't been filmed or taped.

A That's correct.

Q Is it also your assumption that television producers obtain synchronization rights with respect to all programs as to which there is any possibility of a network repeat?

A No.

Q You don't know one way or the other.

A I don't know one way or the other. Specifically you take, for example, the Johnny Carson Show which is taped every day at six o'clock or seven o'clock for showing that night. In very few of those cases, in none of those cases, are the songs cleared ahead of time, though there is a likelihood that his shows will be repeated.

This is just in answer to your question. It could happen where knowingly a producer will not get an clearance, although the chances are that the show will be repeated.

Q Apart from the Johnny Carson Show, hwo many occasions can you think of where you were approached for a televsion synchronization rights license quotation where you knew that the program involved had already been filmed or taped?

A Many times.

Q Or broadcast.

A Many situations. Every request we get for a

license for a network repeat we are aware, of course, that the show had originally been taped and televised.

Q Could you give me an idea of the kind of program you are talking about?

A Again, the Merv Griffin Show, the Johnny Carson Show --

Q I tried to rule those out. Rule out Johnny Carson and Merv Griffin, the late night talk show.

THE COURT: Or some special.

A There are many specials that are not cleared originally. If there was no intent -- there was a show that was mentioned here yesterday, something about The Red, White and Blue.

Q Yes.

A One song of that was cleared because it happened to be a special concept song. But all the other songs on that show, to my knowledge, and I think I'm correct, had not been cleared. It was a one time network exposure. Whether or not the show will be repeated, I don't know. But if it is repeated, the network will expect clearances for each of the songs at a certain fee.

Q Are you confident that the synchronization rights to the music used on that program was not cleared before that program was filmed or taped?

A I'm quite confident, because in this particular case it happened to be a particular type of show where they changed the concept in midstream. Originally the show, I think, was supposed to becalled Ballad For Americans, and because the show had an overall theme about America and almost went into -- and I don't want to get involved in this area -- a more than normal kind of use, almost -- and again I hesitate to use the word -- grand rights use, which is a use over and above normal performing and over and above normal synchronizing, where the producer felt he wanted to get all rights to the song, the fee for that particular composition -- it is not a song, it is a work -- was extremely high, and I felt it was quite high.

And in this connection I had occasion to look at the other songs on the show, and to the best of my knowledge the only song on that show that was cleared -- again, the only work on the show that had been cleared, was Ballad For Americans, and none of the other songs had been cleared.

Q Do you have some reason to believe that the original intention was not to repeat that program?

A I have no idea what the original intention was. It is my estimate that when somebody pays a fee of the nature that was paid for Ballad For Americans, that the

intention is to repeat the show. But, again, there is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.

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Q Do you have any opinion as to what the basis is for that confidence?

A The basis is that the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action.

Q Do you have any basis for believing it might be the copyright proprietor's interest in receiving distributions from ASCAP and BMI in respect to those subsequent performances?

A Certainly it has an effect.

Q Have you talked with Mr. Topkis today about your testimony?

A I spoke to him outside, yes. I should say I didn't speak to him about testimony. He mentioned that I was a good witness.

Q Did he indicate to you the kinds of questions he would ask you on cross-examination?

A No.

Q Did he mention the areas he would cover?

A No.

Q Do you know why the initial network telecasts of particular types of programs do not need synchronization

rights?

A Yes.

Q Why?

A You are going back into history now.

During the latter part of the 1950's publishers agreed that the first telecast of a show would basically be considered live. I have a feeling that this assumption was based upon union negotiations where perhaps a network would have to pay more for a repeat show than a live show; so, for all intents and purposes, when a show was telecast for the purpose of convenience it was considered a live show.

Q All kinds of shows?

A Yes. On the networks.

They called it the Kinescope Letter. It was in an area in which the publishers agreed that certain shows would be considered live. The first performance of the network would be considered live and inasmuch as we don't become involved in live shows there was no licensing or copyright.

Q How does that apply today?

A It still applies today. The networks have expanded this thing. I could take issue with them as to what they consider a sol-called "live show" and what I

consider a "live show," but, again, in the interest of not making waves publishers have accepted the fact that what was considered a taping for convenience in 1957 now has been expanded to the ttpe of show that I mentioned to you, "Downward For Americans."

Q Is it your understanding that all first network performances of all types of programs, films, tapes, the actual motion picture, what have you, all those programs do not need synchronization rights for the first performance?

A Again, pull out the theatrical motionpicture. That I don't become involved in on television.

MISS KEARSE: Doesn't this call for a legal conclusion? It seems to me that it does.

MR. HRUSKA: There was testimony given on cross-examination, your Honor, on this subject.

THE COURT: Such shows are licensed? It is customary?

THE WITNESS: It is customary in the industry for first shows not to be licensed. There are some producers who are supercautious or feel they may eventually want this show to be syndicated outside the United States where they want to know their cost and want to have their cost locked in, in which they will negotiate a license and make a fee

for their show; but the preponderance of the shows on the air for the first use are not licensed.

Q Irrespective of whether the show is filmed or taped?

A Yes. Irrespective of whether it is filmed or taped. Live doesn't enter it.

Q But licenses are obtained in anticipation of expected repeats?

A In some cases, yes.

Q You say "in some cases"?

THE COURT: I take it what he means is some people decide to do that at a time and some decide not to do it at a time.

THE WITNESS: Exactly.

Q Do you know, Mr. Berman, at the time a television producer takes or films his program whether or not he has any anticipation of having that program repeated?

A Generally we don't, except we know that when a producer produces a high-budget show he will look for alternate syndication as a means of recouping the cost.

Q You assume that. You don't know that, do you?

A We assume that.

THE COURT: You find that to be generally borne out in your experience?

THE WITNESS: Correct.

Q You talked on cross-examination about the fact that the synchronization rights fee is likely to be higher if the use plan of the composition was an extended use?

A Yes.

Q Repeated throughout the program, et cetera?

A Yes.

Q In your experience, is the fee likely to be lower than the norm or lower than $150 in the event that only a few bars of the composition are used?

A As I indicated before, generally there is no differentiation between a full use or a partial use, but in a situation where you might have an extended medley, or you might have perhaps 20 or 25 songs in a medley, the publishers will certainly go below their normal fee to enable the show to be produced.

Q This is when the fee gets down to about $50?

A I would say a publisher who normally would charge $50 might go down to $25, and a publisher who charges $150 might go down to $50.

THE COURT: He takes a wholesale approach to it?

THE WITNESS: That's right.

There was one show, Julie-and-somebody at Carnegie Hall, where they had a medley of about 75 com-

positions. In that case all the publishers made it possible by reducing their prices.

Q Does the Fox Agency maintain any records as to the number of occasions when producers requesting the synchronization rights fees come in after the first broadcast of the program?

A We don't keep any specific record, any separation of such a record.

MR. HRUSKA: I have no further questions.

MR. TOPKIS: No recross, your Honor.

MISS KEARSE: No, your Honor.

THE COURT: Thank you very much, Mr. Berman.

(Witness excused.)

MR. RIFKIND: If it please the Court, our next witness is Mr. Burton Lane.

B U R T O N L A N E, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RIFKIND:

Q Mr. Lane, you are a composer?

A Yes, I am.

Q Have you made your livelihood at composing music through most of your career?

A Yes, I have.

Q I think a great many people in this court are familiar with many of your outstanding works, but for purposes of identification would you list a few of the many prominent works you are the composer of?

A Well, I am the composer of music for the show Finian's Rainbow and, more recently, On A Clear Day You Can See Forever.

I did the musical score for an Olsen & Johnson review called Laughing Room Only.

I wrote the score for Al Jolson's last musical on Broadway, Hold On To Your Hats.

I have spent about 23 years in Hollywood writing songs for films. Some of the song hits I have had are: Everything I Have Is Yours; The Lady Is In Love With You;

I Like New York In June, How About You?

How Are Things in Glocca Morra; Old Devil Moon; When I'm Not Near The Girl I Love I Love The Girl I Am Near; On A Great Come And Get It Day; Come Back To Me; On A Clear Day You Can See Forever; What Did I have That I don't Have?

I think that's a partial list.

MISS KEARSE: Your Honor, I am having a little trouble seeing the witness, partly because Mr. Hruska has moved over so he can see the witness. If we could have Mr.Rifkind examine him from the podium it would be helpful.

THE COURT: Off the record.

(Discussion off the record.)

BY MR. RIFKIND:

Q In summary, am I right in understanding, Mr. Lane, that you have written for Broadway shows, you have written for theatrical motion pictures, and you have written for television?

A Yes.

Q In your work as a composer you have been teamed up with some prominent lyricists; is that right?

A That's right.

Q Dorothy Fields, among others?

A And Ira Gershwin, Frank Lesser, Harold Adamson,

Ralph Fried, and Alan J. Lerner.

Q Are you a member of ASCAP?

A Yes, I am.

Q When did you join ASCAP?

A 1933.

Q Are you a member of the American Guild of Authors and Composers?

A Yes, I am.

Q When did you join the American Guild of Authors and Composers?

A 1933.

THE COURT: 1933 also?

THE WITNESS: Yes.

Q You have been a member of each of those organizations continuously since that time?

A That's correct.

Q Have you served on any committee of ASCAP?

A Yes, I have.

Q What committee is that? Which committees are those?

A I have been on the Writers Advisory Committee for 13 years. I was elected to the Board of Review. That term is two years. This happened three or four years ago. At the first meeting of that committee I was elected

chairman by the other members of that committee.

Q You are still on the board?

A No. My term ran for two years.

THE COURT: What does the Board of Review do?

THE WITNESS: I think it does what the name of the board implies: If a writer has a problem with his distribution, if he has a complaint and he brings it up before the board of ASCAP, and if they vote against him, he has the right to bring it up before the Board of Review.

THE COURT: I see. Thank you.

Q What does the Writers Advisory Committee do?

A The Writers Advisory Committee meets approximately twice a year. It is chaired by the President of ASCAP. The members of that committee are able to bring up any problems which the membership at large call to their attention.

At those meetings we are usually kept abreast as to what is going on in ASCAP. This is done by legal counsel and by the President of ASCAP.

Q Am I correct in understanding that the Writers Advisory Committee was established about 1960 when you say you went on it?

A I believe so.

THE COURT: I take it the use of the word "writers"

applies to both composers and authors?

THE WITNESS: Yes.

Q Is there also a Publishers Advisory Committee?

A I believe there is.

Q Are there now two Writers Advisory Committees, one for the East Coast and one for the West Coast?

A Yes.

Q You are on the East Coast Committee now?

A Yes.

Q Mr. Lane, what is the American Guild of Authors and Composers?

A The American Guild is an organization of songwriters. It was established in 1931. At that time it was called the Songwriters Protective Association.

Do you want more?

Q Could you go a little further.

A There is a minimum basic contract which is widely used in the industry by music publishers, and most of the protection which we offer to our members has to do with their relationship with music publishers. We have a policing arrangement, that is, a program which we call the collection of royalties program, and when I say "policing," we collect royalties for our members from the publishers and audit the books of publishers.

Q Have you been active in the affairs of AGAC?

A Yes, I have.

Q Have you been on the council for the AGAC?

A Yes.

Q During what period of time were you on the AGAC council?

A I have served on the council since approximately 1955 until now.

Q Have you been an officer of the AGAC?

A Yes, I have been.

Q What positions have you held?

A I was president of the Guild for ten years beginning in 1957.

Q How do you commonly refer to the Guild? AGAC?

A "The Guild." Also "AGAC."

Q We will call it "The Guild."

A All right.

Q How many members, approximately, does the Guild have?

A Approximately 3000.

THE COURT: 3000?

THE WITNESS: Yes, sir.

Q When you refer to the uniform songwriters contract that you work out with the publishers, how many

publishers have participated in that uniform contract program?

A I could not give you the njmber of publishers, but I would say it is certainly the major publishers use our contract and the contract is widely used throughout the industry.

Q Mr. Lane, I have no desire to pry into your financial affairs. All I would like to know is whether you receive a not insubstantial amount of money as distributions from ASCAP annually.

A Yes, I do.

Q Have you reviewed the transcript of the deposition that you gave in our office on April 5th and 6th?

A Yes, I have.

Q How recently did you do that?

A Last night.

Q Had you done it before then?

A Yes. I've looked at it, I think, three times since that day.

Q Have you conferred with counsel for ASCAP?

A Yes, I have.

Q How recently have you done that?

A Last evening I met with Mr. Blumstein.

THE COURT: Did you say last evening?

THE WITNESS: Yes.

Q And this morning?

A I met with Mr. Blumstein just to come down here.

Q He gave you a lift?

A Yes.

MR. TOPKIS: We would do the same for you any

time.

(Pause)

Q And did you discuss with Mr. Blumstein the questions and answers that had been posed at the deposition?

A Generally, yes.

Q And the questions and answers that you might expect, or at least the questions you might expect, this morning?

A Well, I would imagine it was what he imagined would be asked. We didn't spend a great deal of time on this. His advice to me was just to tell the truth.

Q I have no doubt.

How long did you spend with Mr. Blumstein?

THE COURT: Did you need that advice, Mr. Lane?

THE WITNESS: No, I didn't.

Q How long did you spend with Mr. Blumstein?

A I would imagine about an hour.

Q An hour last evening?

A Yes.

Q Had you met with him at any other time between the conclusion of the deposition at our office and last evening?

A No.

Q Well, had you met with any other representative

of ASCAP in that interim?

A No, I did not.

Q Had you met with Mr. Blumstein before the deposition was taken in our office?

A Yes, I did.

Q And with any other representative of ASCAP?

A Briefly, with Mr. Korman and with the counsel for AGAC.

THE COURT: Who is the first person you mentioned?

THE WITNESS: Mr. Korman, Bernard Korman.

Q Mr. Lane, have you organized at one time or another any publishing companies or have you had an interest in any publishing companies?

A Yes, I have had.

Q And which are they?

A When I was signed to Chapels, I still have a deal with Chapels, they set up a subsidiary company in which the score for Finian's Rainbow was placed, and another firm was set up with Alan Lerner -- No. I'm sorry. Another firm was set up for me, also in Chapels, in which I published another song that I had written, a song away from the show.

Q Is that an unusual thing for a prominent composer

to do, in your experience, that is, to have his own publishing company, someone administer his own publishing company for him?

A I think this is the dream of most song writers once they have obtained some success. I believe I said in my deposition that when we go to work, we start with a blank sheet of paper, and if we are lucky we come up with something which has value, and that puts the music publisher in business.

So it is a very desirable thing for writers to share in the profits of their own works.

Q Well, of course, a writer does get performance rights distributions for his own works even if he doesn't have a publishing company, don't he?

MISS KEARSE: I object on the ground it is a leading question.

THE COURT: The objection is overruled. I don't consider this to be a leading question.

Q Did you hear the question?

A I would like it repeated.

Q Writers do participate, do they not, in the economic results of their writing even if they do not have a publishing company that they have an interest in?

A Yes.

Q What is the economic attraction of an interest in a publishing company?

A Well, we share in the profits of that company, which go beyond what we would get as song writers.

THE COURT: I don't know whether this is being built up for an appellate court, but I certainly understand why the composer would wish to share in every function in relation to the song he can.

MR. RIFKIND: Okay.

Q Now, Mr. Lane, I would like to show you Exhibit 135 for identification.

THE COURT: That is PX 135, I take it?

MR. RIFKIND: Yes. I'm sorry.

THE COURT: If it can be found.

Is this an important exhibit?

MR. RIFKIND: It is.

THE COURT: Why don't we recess at this time until two o'clock.

(Luncheon recess)

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